



2004

Continuity of Congress: A Play in Three Stages

Howard M. Wasserman
howard.wasserman@fiu.edu

Follow this and additional works at: https://ecollections.law.fiu.edu/faculty_publications



Part of the [Law and Politics Commons](#), and the [Legislation Commons](#)

Recommended Citation

Howard M. Wasserman, *Continuity of Congress: A Play in Three Stages*, 53 Cath. U. L. Rev. 949 (2004).
Available at: https://ecollections.law.fiu.edu/faculty_publications/70

This Article is brought to you for free and open access by the Faculty Scholarship at eCollections. It has been accepted for inclusion in Faculty Publications by an authorized administrator of eCollections. For more information, please contact lisdavis@fiu.edu.

HEINONLINE

Citation: 53 Cath. U. L. Rev. 949 2003-2004



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Nov 11 17:44:47 2014

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0008-8390](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0008-8390)

CONTINUITY OF CONGRESS: A PLAY IN THREE STAGES

Howard M. Wasserman⁺

I. COMPLEXITIES OF CONTINUITY OF CONGRESS

Whither Congress in the event of a terrorist attack? Much of the conversation about “continuity in government” has focused on the Presidency—on ensuring the survival of one individual in whom the Executive power under the Constitution is vested. The focus has been, in the words of President George W. Bush, to put “measures in place that should somebody be successful in attacking Washington, D.C., there’s an ongoing government.”¹ But when the President talks about ongoing government, he talks only of an ongoing President and executive branch. Most of the security efforts on September 11, 2001, concerned the protection of the President, Vice President, and Cabinet members in the Presidential line of succession.² In the months following the September 11 terrorist attacks, Vice President Richard B. Cheney spent a significant amount of time in undisclosed secure locations to ensure his safety as the preferred Presidential successor.³

In fact, evidence now suggests that Congress was the terrorist target that morning. United Flight 93, which crashed in a field in western Pennsylvania after passengers fought back against the hijackers, appears to have been headed for the Capitol.⁴ What ultimately saved the Capitol

⁺ Assistant Professor of Law, Florida International University College of Law. J.D., 1997, B.S., 1990, Northwestern University. Thanks to Thomas Baker and Matthew Mirow for comments and suggestions.

1. See, e.g., Press Release, Presidential Q&A with Pool Reporters (Mar. 1, 2002), <http://www.whitehouse.gov/news/releases/2002/03/20020301-5.html>.

2. See Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 281 (2003).

3. See *id.* at 294.

4. See CONTINUITY OF GOV'T COMM'N, THE CONGRESS 2 (2003), available at <http://www.continuityofgovernment.org/pdfs/FirstReport.pdf>; see also *id.* app. II, at 34 (quoting reports of interviews indicating that the fourth plane headed for Congress); *Ensuring the Continuity of the United States Government: The Congress: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) [hereinafter *Congressional Continuity Hearing*] (statement of Norman J. Ornstein), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id2565 (“Plotters of the September 11th attacks have told the media that the fourth plane, United flight 93, was headed for the Capitol”); *id.* (statement of Samuel Wright), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2570 (“But for the heroic resistance of the passengers, the aircraft might very well have crashed into the Capitol, killing hundreds of members of the Senate

and members of Congress was that the flight departed forty-one minutes late, which allowed passengers to learn the fates of the three other hijacked planes and to attempt to retake the plane.⁵ Otherwise, United Flight 93 might have crashed into the Capitol sometime between 9:00 and 9:30 a.m., when the (then sparsely populated) House of Representatives was opening session and several leadership, committee, and private meetings were taking place throughout the building.⁶ Yet, little was said about implementing measures to ensure a continuing or ongoing Congress, at least until the Continuity of Government Commission, a private nonpartisan group comprised of academics and former government officials jointly established by the American Enterprise Institute and the Brookings Institution, issued a report on the subject in June 2003.⁷

Continuity of government cannot be understood or approached as a monolithic problem. Separation of powers remains the dominant structural precept of the National Government established by the Constitution.⁸ Ensuring that there is an ongoing Federal Government means ensuring that there are three ongoing branches—three ongoing distinct governing bodies—each with a different nature and structure and each with different constitutional, statutory, and administrative rules

and House of Representatives.”); *id.* (statement of Thad Hall), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2567 (“The September 11th terrorist attacks could have been far worse had one of the airplanes hijacked by the terrorists struck the United States Capitol. The attack would have come just as the House was going into session and the House Appropriations Committee met in the Capitol building.”).

5. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 2.

6. See *id.* at 2-3.

7. See generally *id.* at iii. Several constitutional amendments addressing congressional continuity were introduced in Congress in the months after September 11, but none were enacted or even seriously considered. See, e.g., H.R.J. Res. 67, 107th Cong. (2001); H.R.J. Res. 77, 107th Cong. (2001); S.J. Res. 30, 107th Cong. (2001).

8. See THE FEDERALIST NO. 51, at 314 (James Madison) (Garry Wills ed., 1982) (arguing that the Constitution “so contrive[d] the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places”); see also RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 52 (1969) (arguing that systemic protections in the Constitution were to be provided by the “classic doctrine of separation of powers”); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 163 (1995) (“[W]e must remember that our Constitution is built on presidential/separation of powers premises”); Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 688 (1997) (“[T]he separation of powers principle serves mostly as a line-drawing tool to mark the boundary between one institution’s constitutional tasks and those reserved to another.”); Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345, 359-60 (2001) (“Power was to be divided among three coordinate branches of the federal government; each branch was to have its own realm of power and was to be provided with the formal tools, means, and will necessary to protect that realm.”).

governing that structure and the continuity of its operations. Separation of powers means there can be no continuity of the Federal Government, consistent with our constitutional understanding of it, unless there is continuity of all three branches, in particular both political branches to enact new legislation. Absent a functioning Congress, the Federal Government functions not as it was structurally designed, but as a dictatorship of the executive.⁹

Executive continuity involves a narrower focus, because the Executive power of the United States is repositied in a single individual.¹⁰ The need for executive succession arises from the death or disability of one individual, the President;¹¹ the death or disability of a second individual, the Vice President, triggers a statutory chain reaction of executive and legislative officers in the line of succession.¹² Presidential continuity focuses on the orderly transfer of power from one individual to another. Congress can ensure Presidential continuity if it can establish a proper line of succession (something few believe Congress has done yet)¹³ and

9. *Compare Ensuring the Continuity of the United States Government: A Proposed Constitutional Amendment to Guarantee a Functioning Congress: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Constitutional Amendment Hearing*] (statement of Sanford Levinson), http://judiciary.senate.gov/testimony.cfm?id=1022&wit_id=2919 (“[S]hould we, then, be faced with a Congress that is unable, for whatever reason, to function, it is almost a logical—and most certainly, an empirical—truth that power would flow to what can only be called dictatorship by a presumably functioning Executive Branch.”), with H.R. REP. NO. 108-404, pt. II, at 5 (2004) (downplaying the danger of such a dictatorship, largely in light of the power of Congress, either in rump or reconstituted form, to impeach a President who abuses executive authority).

10. See U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States.”); see also THE FEDERALIST NO. 69, *supra* note 8, at 418 (Alexander Hamilton) (“The first thing which strikes our attention is that the executive authority, with few exceptions, is to be vested in a single magistrate.”); Fitzgerald, *supra* note 8, at 756-57; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994).

11. See U.S. CONST. amend. XXV, § 1 (“In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”).

12. See *id.* art. II, § 1, cl. 6; 3 U.S.C. § 19 (2000); see also Wasserman, *supra* note 8, at 354.

13. See *Ensuring the Continuity of the United States Government: The Presidency: Hearing Before the S. Comm. on Rules and Admin. and the S. Judiciary Comm.*, 108th Cong (2003) [hereinafter *Presidential Continuity Hearing*] (statement of Akhil Reed Amar), http://judiciary.senate.gov/testimony.cfm?id=914&wit_id=2603 (“The current presidential succession act . . . is in my view a disastrous statute, an accident waiting to happen.”); *id.* (statement of Dr. John C. Fortier), http://judiciary.senate.gov/testimony.cfm?id=94&wit_id=2604; *id.* (statement of Howard M. Wasserman), http://judiciary.senate.gov/testimony.cfm?id=914&wit_id=2605 (arguing that the underlying premises of § 19 have proven theoretically and factually incorrect over time); see also Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 136 (1995); Calabresi, *supra* note 8, at 156; John C.

provide for the security of some or all successors such that some designated individual survives an attack and can assume the Executive power.¹⁴

By contrast, the legislative power under the Constitution is reposed in an institution, Congress, composed of two distinct subinstitutions, the Senate and the House of Representatives.¹⁵ It is technically inaccurate to refer to continuity of Congress, as opposed to continuity of the Senate and continuity of the House; the two bodies possess distinct characteristics, are governed by distinct constitutional provisions, and arguably require distinct approaches to continuity.¹⁶ Moreover, continuity of Congress demands continuity of operations in both houses; bicameralism means there is no continuity of Congress, and thus of the Federal Government, unless both the Senate and the House of Representatives are able to function.¹⁷

Because there are 100 senators and 435 representatives, the death or disability of one or a small number of these officials does not legitimately threaten continuity; it takes a larger, more comprehensive and destructive attack on the institution itself to disrupt its operations. It also means the complete destruction of Congress—the death of every single member of that body—is somewhat less likely; a rump Congress of some number of members likely would survive the attack.¹⁸ On the other hand,

Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 994-95 (2004); Wasserman, *supra* note 8, at 409-10.

14. See *Presidential Continuity Hearing*, *supra* note 13 (statement of Akhil Reed Amar), <http://judiciary.senate.gov/testimony.cfm?id=914> (proposing cabinet position of Assistant Vice President, whose role would be to be “in the line of succession but out of the line of fire”); *id.* (statement of Howard M. Wasserman), http://judiciary.senate.gov/testimony.cfm?id=914&wit_id2605 (proposing similar position of First Secretary); see also Fortier & Ornstein, *supra* note 13, at 1010.

15. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”); see also Lawson, *supra* note 10, at 1239 (“Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them.”).

16. See THE FEDERALIST NO. 51, *supra* note 8, at 316 (James Madison) (“The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.”).

17. See U.S. CONST. art. I, § 7 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States”); Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 6 (2001) (“The federal government could not pass laws, appoint officials, or enter into treaties without a Congress, Senate, and a President.”).

18. Reports suggest that the Capitol was not full on the morning of September 11. CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 2-3. Of course, had the hijackings

such a large number of members also means that continuity of Congress cannot be attained by a simple transfer of power from one individual to another, because it is the institution whose survival and continuity must be ensured.¹⁹ Institutional continuity depends on a wider range of constitutional and statutory solutions.

Continuity of Congress is an umbrella term for a three-stage process. The first stage is immediate continuity—the hours, days, and first week after a terrorist or military attack directed at Washington, D.C., and the Federal Government.²⁰ The second stage is repopulation, focusing on filling seats rendered vacant by the deaths of members in both houses of Congress, restoring both houses to full working capacity, and allowing Congress to move forward as a fully functioning bicameral legislature.²¹ Repopulation can be divided into two parts: interim and final. Final repopulation is the end stage of continuity, the point at which vacant seats would be filled by replacements chosen by the ordinary means of selection for both houses, direct popular election.²² Congress is not repopulated in a manner that retains the populist nature of the body, especially the House of Representatives, if a substantial number of seats remains either vacant or occupied by members chosen by means other than popular election at the state or district level.²³

Interim repopulation bridges the gap between immediate continuity and final repopulation; it places someone in the vacant seat, but via a fundamentally different selection procedure.²⁴ The importance of the interim repopulation stage turns on how quickly a popular election can be held in the aftermath of a terrorist attack; the more quickly elections

occurred one week earlier, the plane might have struck the Capitol when the President of Mexico was addressing a joint session of Congress. *See id.* at 3. The simultaneous death of every member of Congress also is less likely because members frequently are away from Washington, given their responsibilities to constituents in their home states and districts and the fact that Congress often is not in session.

19. *See* *United States v. Ballin*, 144 U.S. 1, 5-6 (1892) (stating that the capacity of a house of Congress to transact business “does not depend upon the disposition or assent or action of any single member”).

20. *See infra* notes 42-81 and accompanying text.

21. *See* Wasserman, *supra* note 2, at 305-06 (“The structural question [with respect to repopulation] will be what processes can and should be followed to replace those killed . . .”).

22. *See* U.S. CONST. amend. XVII, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .”); *id.* art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the Several States . . .”). Depending on the timing of the attack and the amount of time remaining on the term for a given seat, final repopulation may await the election of a seat holder in the regularly scheduled election for that seat.

23. *See infra* notes 72-82 and accompanying text.

24. *See infra* notes 83-114 and accompanying text.

can take place, the shorter the interim repopulation period and, perhaps, the less the need for that period. The model for two-stage repopulation is the Senate, where governors have the power to make appointments to vacant seats until an election can be held to fill the seat with a duly elected member.²⁵ Unfortunately, no similar appointment provision exists in the House, where only a new election can fill a vacant seat.²⁶

Each of these three stages requires distinct procedures that can be established via different mechanisms. Some elements of congressional continuity may require constitutional amendment, some only statutory enactment, and some only changes to the rules of proceeding of each house.²⁷ This raises questions as to the venue in which continuity procedures should be established²⁸ and, in the case of a constitutional amendment, the level of detail to be provided in that amendment.²⁹ Importantly, Congress must not be reluctant to amend the Constitution if an amendment is the only way to grant the unquestioned power to establish necessary continuity procedures.³⁰

It might be quite difficult to draft a single constitutional amendment (or even a series of amendments) to address the multifaceted concerns of congressional continuity.³¹ Congress and/or the states would be forced to follow a piecemeal approach to continuity at the risk of losing some elements of the overall plan.³² Congress could, for example, draft an

25. See U.S. CONST. amend. XVII, cl. 2 (“[T]he legislature of any State may empower the executive thereof to make temporary appointment[s] until the people fill the vacancies by election as the legislature may direct.”); see *infra* notes 85-88 and accompanying text.

26. See U.S. CONST. art. I, § 2, cl. 4; see *infra* notes 89-114 and accompanying text.

27. See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings”); *Constitutional Amendment Hearing*, *supra* note 9 (statement of Sanford Levinson), http://judiciary.senate.gov/testimony.cfm?id=1022&wit_id=2919.

28. See Wasserman, *supra* note 8, at 347-48 (stating that rules and procedures for selection of federal officials may be established and detailed in the Constitution itself or in framework legislation enacted on selection issues that have been punted to Congress).

29. CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 24 (recommending that the amendment be concise, granting Congress power to legislate within broad limits); *id.* at 25 (describing more detailed proposals).

30. See *Constitutional Amendment Hearing*, *supra* note 9 (statement of Sanford Levinson), http://judiciary.senate.gov/testimony.cfm?id=1022&wit_id=2919 (“[I]t rejects the very wisdom of Washington and other members of his generation to believe that amendment is unthinkable or even that an unrealistically high burden of proof should be placed on those who propose amendment.”).

31. See THE FEDERALIST NO. 37, *supra* note 8, at 194 (James Madison) (describing the “difficulties inherent in the very nature of the undertaking referred to the Convention”).

32. In contrast to congressional continuity, Presidential continuity procedures can be established in a single legislative act (incorporating multiple issues and provisions) by drafting a statute either amending or repealing and replacing the Presidential Succession

amendment explicitly empowering governors to appoint temporary members to the House of Representatives whenever a critical number of seats have been left vacant due to death or long-term disability and establishing a period within which elections must be held to permanently fill those vacancies.³³ Such an amendment specifically addresses interim and final repopulation, but not immediate continuity during the first week after the attack, which must be addressed by a separate enactment.

An alternative is Senator John Cornyn's current proposed constitutional amendment granting Congress a general power to "provide for the case of death or inability . . . in the event that one-fourth of either House are killed or incapacitated, declaring who shall serve until the disability is removed, or a new Member is elected."³⁴ This is the correct approach in that it uses broad language to punt the entire issue (all three stages and all underlying elements) to Congress to address, in its discretion, in a single, uniform, and wholesale manner through its statute—and rule-making powers.³⁵

However, the use of too-general language may create problems. On one hand, a general power grant must be read in light of and consistent with other constitutional limitations absent express overruling or repealing language. Article I provides that House vacancies are to be filled by special election.³⁶ While the purpose of Senator Cornyn's

Act of 1947. See *Presidential Continuity Hearing*, *supra* note 13 (testimony of Dr. John C. Fortier), http://judiciary.senate.gov/testimony.cfm?id=914&wit_=2604.

33. See, e.g., H.R.J. Res. 67, 107th Cong. (2001) (proposing a constitutional amendment empowering governors to appoint House members within seven days whenever twenty-five percent or more of the members are unable to fulfill their duties, with appointees serving until a special election is held within ninety days); H.R.J. Res. 77, 107th Cong. (2001) (same); S.J. Res. 30, 107th Cong. (2001) (proposing similar amendment, with fifty percent threshold). These amendments grant Congress the power to enforce the new constitutional provision by appropriate legislation.

34. S.J. Res. 23, 108th Cong. (2003); see also CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 24 (proposing amendment providing that "Congress shall have the power to regulate by law the filling of vacancies that may occur in the House of Representatives and Senate in the event that a substantial number of members are killed or incapacitated"). Senator Cornyn's plan is pending in the Senate as of this writing. But even if it were to pass the Senate, it is unlikely to pass the House, given the overwhelming rejection in June 2004 by the House of House Joint Resolution 83, which proposed a more detailed constitutional amendment that included House appointments for vacant and incapacitated seats. See 150 CONG. REC. H3665-81 (daily ed. June 2, 2004) (recording defeat of House Joint Resolution 83 by 194-221 margin).

35. See *Constitutional Amendment Hearing*, *supra* note 9 (statement of Howard M. Wasserman), http://judiciary.senate.gov/testimony.cfm?id=1022&wit_id=2918 (arguing that Senator Cornyn's proposal "takes the correct approach in utilizing a short, broad constitutional grant of power to Congress to address the catastrophic attack scenario and to establish appropriate procedures to ensure the continuity of Congress").

36. See U.S. CONST. art. I, § 2, cl. 4; see also Wasserman, *supra* note 2, at 305 ("Representatives must be popularly elected by the voters . . . and vacancies are filled by

resolution is to supersede that provision with regard to vacancies created in the mass-destruction scenario, the text of the proposed amendment does not obviously achieve that result,³⁷ at least with regard to filling vacant seats.³⁸ Without language expressly superseding the Article I Special Election Clause, implementing legislation providing for House appointments to vacant seats, although passed pursuant to this new amendment, arguably runs afoul of the earlier limitation.

On the other hand, if the general power grant can supersede Article I as to procedures for filling House vacancies, it arguably could supersede other explicit constitutional provisions as they relate to continuity after an attack. For example, the amendment could empower Congress to provide by law that mid-level officers from various executive branch departments will serve as temporary members of Congress in the wake of an attack without having to resign their executive offices, in violation of the Incompatibility Clause.³⁹ More extremely, it might empower Congress to provide that only White males who announce a belief in the Trinity may be appointed to fill House vacancies or that no nineteen-

special elections before those same voters at a time and place established by the state executive.”).

37. Proponents of Senator Cornyn’s current language might make two arguments: (1) the history underlying the amendment will make clear the amendment’s purpose of superseding Article I, Section 2; and (2) a provision for interim appointments would not run afoul of Article I because the appointees only would be *acting* members of the House and the vacancies ultimately will be filled by “members” selected by new popular election. See U.S. CONST. art. II, § 1, cl. 6 (“Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President . . .”). The problem then becomes that the Constitution does not provide for *acting* members of the House or Senate, only for members. Cf. *id.* (providing that, in the event of a double Presidential vacancy, Congress may “declar[e] what Officer shall then *act as President*, and such Officer shall *act accordingly*” (emphasis added)); *id.* amend. XXV, § 3 (establishing process whereby the Vice President discharges the Executive power as acting President when the President declares a temporary inability to discharge the powers and duties of the office). On the other hand, the general power grant may be read to empower Congress to create a class of acting legislators, absent a contrary limitation on such a category elsewhere in the Constitution.

38. None of these concerns attaches with respect to seats whose members have been disabled, as opposed to killed, in the attack. The general statement of congressional power effectively grants discretion to Congress, unimpeded by other constitutional language, to declare who shall serve in a House or Senate seat until the member’s disability is removed. The Constitution elsewhere is silent as to disabled members of Congress. See *infra* Part III.

39. See U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

year-old woman may vote in the special election, all in derogation of specific constitutional limitations.⁴⁰

Congress obviously is not about to enact such prohibitions. The point is that a broad power grant cannot be read to authorize Congress to override some constitutional provisions (as to the mode and manner of filling House vacancies) without authorizing it to override others (as to equal protection, the right to vote, or separation of powers). Limiting language in the proposed amendment should resolve the problem. For example, we might add to Senator Cornyn's proposed language a provision that Congress may act "notwithstanding" other limitations on the mode and manner of selection or filling vacancies or on the rules of proceeding in each house with regard to the quorum. This language limits the supersedure to its intended scope; the amendment overrides some constitutional provisions (the Special Elections Clause or the Quorum Clause) as intended, without being, potentially, too broad.⁴¹

This article emphasizes that continuity of Congress demands a range of action in several venues in order to establish distinct procedures for three distinct stages. My focus will not be on the specific forum in which continuity procedures should be established or the specific language used to establish those procedures. Rather, the focus will be on understanding the three stages of continuity and the general rules and procedures that each stage demands. The point is that Congress, in making structural choices, must take a broad view of the concept of legislative continuity in order to understand and address all three stages of the process.

40. See *id.* art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *id.* amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."); see also *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.").

41. Another way to achieve the same result would be to divide the amendment into two sections: section one would repeat the exact language of Article I, Section 2, Clause 4; section two would contain the current language of Senator Cornyn's proposed amendment. This makes explicit and uniform the method of establishing rules for filling vacancies in the House, both in the ordinary case and in this special situation. At the same time, placing these distinct provisions together explicitly limits the reach of the new power granted to Congress to change the mode and manner of appointment. I thank Thomas Baker for suggesting this structural approach.

II. THREE STAGES OF CONTINUITY OF CONGRESS

A. Immediate Continuity

Immediate continuity focuses on the hours, days, and first week after a catastrophic terrorist attack on Congress and the Federal Government. This is the initial period during which the national leadership in all three branches attempts to assess the physical and human damage, determine which government leaders have been killed, injured, or incapacitated by that attack, and decide how to proceed. It would be impossible to replace members of either house of Congress; replacement procedures could not work that fast, and more basically, the condition or status of most members would be unknown. The search and rescue at the World Trade Center and Pentagon after September 11 shows that it will take days or weeks to dig through the rubble and begin to assess the damage. Likewise, it may be days before a successful biological or chemical attack, such as the release of anthrax or ricin in congressional buildings, takes its toll on members and staffers.

The first days after an attack will be dominated by the President, the executive branch, and emergency first responders (the military, CIA, FBI, FEMA, and other executive agency personnel, as well as the National Guard, state and local law enforcement, and public safety personnel) exercising their discretion under existing laws, regulations, practices, and appropriations.⁴² We expect little legislative activity in these few days; indeed, even some members of Congress suggest that enacting new legislation may be a bad idea in the heightened tension and emotion of this period.⁴³ The immediate role of Congress may be largely

42. Presidential continuity is the more immediate concern after an attack. See *Presidential Continuity Hearing*, *supra* note 13 (statement of Dr. John C. Fortier), http://judiciary.senate.gov/testimony.cfm?id=914&wit_id=2604 ("After an attack, there may be a need for a new president to act immediately."); see also H.R. REP. NO. 108-503, at 9 (2004) ("Congress has already granted the President, by statute, wide authority to act in emergency circumstances."). Presidential and congressional continuity are necessarily linked in the worst-case scenario of the death or disability of the President, Vice President, and every Cabinet member enumerated in the statutory line of succession, perhaps along with a substantial portion of Congress. If the Speaker and President *pro tempore* remain in the line of Presidential succession, the Speaker, whether one who survived the attack or who was selected anew by the skeletal Congress, becomes an eligible successor under § 19 and may become acting president. See Wasserman, *supra* note 2, at 299 ("[T]he naming of the new Speaker provides the means for naming a new acting president."); see also *Presidential Continuity Hearing*, *supra* note 13 (statement of Howard M. Wasserman), http://judiciary.senate.gov/testimony.cfm?id=914&wt_id=2605 (same).

43. See *Congressional Continuity Hearing*, *supra* note 4 (statement of Sen. Patrick Leahy), http://judiciary.senate.gov/member_statement.cfm?id=909&wit_id50 ("Perhaps we can survive a brief interim period without a functioning House of Representatives,

symbolic, as when members of both houses gathered on the Capitol steps immediately after 9/11 “to demonstrate to the nation and the world that the work of the American government would continue.”⁴⁴

This symbolic role is not insignificant. Moreover, the fact that the Federal Government can, if absolutely necessary, operate for these few days without Congress does not mean that we should accept the absence of Congress as inevitable. If it is feasible to establish procedures that will allow Congress to function in the immediate aftermath of the attack, those procedures should be established.

The key to immediate continuity is empowering whatever rump or skeletal Congress survives the attack. The obstacle is that the rump Congress must operate consistent with the rules of that institution, specifically the requirement that each house attain a quorum to do business, which the Constitution defines as “a Majority of each” house.⁴⁵ In order for the rump Congress to function as a legislative body, both houses must attain the required majority. James Madison defended the use of a majority, as opposed to a larger number, as the quorum because it better enables the legislature to act in “cases where justice or the general good might require new laws to be passed, or active measures to be pursued.”⁴⁶ The days after a terrorist attack on Congress are a period in which both justice and the general good require an active government, which means a functioning Congress.

Imagine that 101 representatives and thirty-one senators survive a terrorist attack uninjured. The open constitutional question is the quorum denominator. The Constitution does not define whether the quorum requires a majority of authorized seats in a house or a majority of occupied seats, of living, selected, and sworn members of that house. The post-attack rump Congress can function only if the Constitution allows the House to find a quorum when fifty-one members are present, the Senate when sixteen senators are present.

One possibility is that the denominator is authorized seats in each house, 435 in the House, 100 in the Senate. Such a constitutional requirement renders a quorum unattainable, even if every member is present, because each house has fewer members than a majority of total

especially since post-tragedy legislative actions might be governed more by emotion than by sound policy judgments.”).

44. See *id.* (statement of Sen. Orrin Hatch), http://judiciary.senate.gov/member_statement.cfm?id=909&wit_id=51.

45. See U.S. CONST. art. I, § 5, cl. 1.

46. THE FEDERALIST NO. 58, *supra* note 8, at 358 (James Madison) (responding to arguments for a quorum higher than a majority and arguing for the need for the legislature to act in “cases where justice or the general good might require new laws to be passed, or active measures to be pursued”).

seats. It is impossible for Congress, and therefore the Federal Government, to function, resulting in a unilateral executive dictatorship.

Alternatively, the denominator could be seats presently occupied by living members.⁴⁷ The current Senate rule defines the quorum as a “majority of the Senators duly chosen and sworn,” distinct from the established, but unoccupied, seats themselves.⁴⁸ In the House, the current parliamentary interpretation is a “majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by action of the House.”⁴⁹ A different House rule provides that “upon the death, resignation, . . . or [other] removal of a Member, the whole number of the House [is to] be adjusted accordingly.”⁵⁰ The denominator is the whole number of the House, but the whole number of the House includes only elected, sworn, living members currently occupying seats. Finally, House rules provide that during quorum calls the “names of Members” are to be called;⁵¹ the focus on members in the House rules is distinct from seats and suggests a permissible denominator of chosen, sworn, living occupants of those seats.

The more expansive parliamentary understanding of the quorum requirement is a product of the similar historical crisis in the functioning of Congress during the Civil War. The House redefined the quorum denominator at the beginning of the war in 1861, out of concern that a majority of possible seats, which could have included representatives from the seceded southern States, could not be obtained. Speaker Galusha A. Grow ruled that the quorum would be based on a denominator of those legitimately chosen and sworn, a measure that excluded the vacant Southern seats from the denominator.⁵² The Senate followed suit in 1864.⁵³ Ultimately, both houses during and after the Civil War would have been able to maintain quorums even on whole-house denominators, thanks to the seating of senators and representatives from the loyalist government of western Virginia (what became the State of West Virginia).⁵⁴

47. See Wasserman, *supra* note 2, at 300-01.

48. STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, R. VI (2000), *available at* <http://rules.senate.gov/senaterules/rule06.htm>.

49. CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 9.

50. RULES OF THE HOUSE OF REPRESENTATIVES, 108TH CONG. R. XX(5)(c), at 31 (2003), *available at* <http://www.house.gov/rules/108rules.pdf>.

51. See *id.*

52. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 8-9.

53. See *id.* at 9.

54. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 382 (2001); *id.* at 378 n.11 (stating that the two congresses immediately after the Civil War contained absolute majorities of both houses, even if the South was counted in

However, historical practice during the First Congress suggests a contrary conclusion.⁵⁵ Congress met for the first time on Wednesday, March 4, 1789.⁵⁶ Neither house had a quorum on that date so both adjourned, doing so repeatedly for the next month.⁵⁷ The House of Representatives finally attained a quorum of thirty on April 1, and the Senate attained a quorum of twelve on April 6.⁵⁸ The actions of the Senate during this period are instructive. On March 11, 1789, the eight present senators, on behalf of themselves and the eighteen present House members, sent a letter to twelve absent senators, emphasizing the “utmost importance” of a quorum sufficient to proceed to business and requesting that the absent senators communicate “information of their situation” and attend as soon as possible.⁵⁹ This request or compulsion for attendance could be sent only to a member of the Senate—someone

the denominator); see also Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 300 (2002).

55. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS, THE FEDERALIST PERIOD, 1789-1801*, at 3-4 (1997) (“[I]n a very real sense it can be said that the First Congress was a sort of continuing constitutional convention, and not simply because so many of its members . . . had helped to compose or to ratify the Constitution itself.”); 2 FRANCIS NEWTON THORPE, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1765-1895*, at 176-77 (1901) (noting the number of members of the First Congress who had participated in the Constitutional Convention in Philadelphia or in the ratifying conventions).

56. See CURRIE, *supra* note 55, at 3; THORPE, *supra* note 55, at 176; see also 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, at 3 (Linda Grant De Pauw et al. eds., 1972) [hereinafter DOCUMENTARY HISTORY]. March 4, 1789, is understood as the point at which the Constitution came into operation. See *Owings v. Speed*, 18 U.S. (5 Wheat.) 420, 422 (1820) (holding that the Constitution of the United States came into operation on the first Wednesday in March, 1789); see also THORPE, *supra* note 55, at 175 n.1. But see Lawson & Seidman, *supra* note 17, at 37 (arguing that the Constitution became law over a period of time, as different aspects of the document became active at different points between August 1788 and April 1789).

57. See CURRIE, *supra* note 55, at 3; THORPE, *supra* note 55, at 176; DOCUMENTARY HISTORY, *supra* note 56, at 3 (Senate Journal showing eight senators present); *id.* at 3 (Journal of the House of Representatives, showing thirteen representatives, less than a “quorum of the whole number”).

58. See THORPE, *supra* note 55, at 176; DOCUMENTARY HISTORY, *supra* note 56, at 7 (showing on April 6, 1789, the presence of a “majority of the whole number of Senators of the United States”); *id.* at 7 (showing on April 1, 1789, in the House of Representatives “a quorum, consisting of a majority of the whole number, being present”).

59. See DOCUMENTARY HISTORY, *supra* note 56, at 3-5 & n.2 (noting a similar letter sent March 18, 1789, to eight absent senators). The first letter was addressed to Tristram Dalton, William Paterson, Jonathan Elmer, George Read, Richard Bassett, Charles Carroll, John Henry, Richard Henry Lee, William Grayson, Ralph Izard, Pierce Butler, and James Gunn. See DOCUMENTARY HISTORY, *supra* note 56, at 4. The second letter was sent to Elmer, Paterson, Read, Bassett, Carroll, Henry, Lee, and Grayson. See *id.* at 5.

living and already selected for his seat and able to assume that position once he presented himself and was sworn.⁶⁰

The denominator for the first Senate quorum did not include seats for Rhode Island and North Carolina, neither of which had yet ratified the Constitution.⁶¹ As such, twenty-two was the maximum quorum denominator, reflecting the total number of seats in the Senate, requiring twelve for a quorum. However, New York did not select its two senators until July 1789; the two Senate seats from New York were vacant when the Senate convened in March.⁶² Thus, a denominator based only on selected members holding seats in March would have been twenty, and a majority of eleven would have established a quorum. But the Senate did not find a quorum from the eleven senators present on March 28;⁶³ it found a quorum only after a twelfth Senator, Richard Henry Lee of Virginia, presented his credentials on April 6.⁶⁴ In other words, the first Senate demanded a majority of the twenty-two possible seats for a quorum, whether or not those seats had, in fact, been filled.

But consider the problems that could have arisen during this period if that larger denominator were constitutionally mandated. Although opponents of the Constitution generally fell into line once a given state had ratified,⁶⁵ the influence of Anti-Federalists continued, risking, in the eyes of Federalists, "much mischief."⁶⁶ In New York, ongoing disagreements between Federalists and Anti-Federalists prevented the legislature from choosing electors to vote in the first Presidential election and from selecting senators until July.⁶⁷ Suppose other states similarly

60. See U.S. CONST. art. I, § 5, cl. 1 (providing for the power of less than a majority to "compel the Attendance of absent *Members*" (emphasis added)).

61. See THORPE, *supra* note 55, at 177.

62. See TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT* 39, 48 (1994); see also DOCUMENTARY HISTORY, *supra* note 56, at 91 (showing the first presentation of Senator Rufus King of New York on July 25, 1789).

63. See DOCUMENTARY HISTORY, *supra* note 56, at 6 (reflecting the first appearance of Senator Jonathan Elmer of New Jersey, an eleventh senator, but the adjournment of business because of the absence of a quorum).

64. See *id.* at 6-7.

65. See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 306 (1966) ("Perhaps this is endemic to America; once the vote is counted, everybody wants to be in the parade.").

66. See THORPE, *supra* note 55, at 175.

67. See BOWEN, *supra* note 65, at 306 (describing New York's grudging, conditions-filled ratification, including suggestion by one Anti-Federalist that New York declare its right to withdraw from the Union after a number of years if suggested amendments were not considered); KURODA, *supra* note 62, at 39 ("No state offers a better example of how rival political interests and ideas affected the choice of [federal officials] in 1789 than New York, a late, reluctant, and divided supporter of the Constitution."); *id.* at 48-49 (discussing lessons learned in New York from the long debates and the lack of participation in the first Presidential election); *id.* at 48 (discussing belated selection of two

had delayed choosing senators and representatives. If those unfilled seats must count in the quorum denominator, the few entrenched opponents of the Constitution could have prevented Congress, and by extension the Federal Government, from ever transacting business by depriving it of the machinery of governance: a bicameral Congress and a President to pass laws and appoint officials.⁶⁸

The Constitution established a majority (rather than some larger number) as the legislative quorum specifically to prevent a small number of individuals from scuttling the ability of Congress to act.⁶⁹ The larger denominator, if constitutionally required, would have permitted states, or factions within states, to delay the effectiveness of the Constitution and the ability of the new government to function, contrary to the very purpose of the Quorum Clause.

An unduly restrictive interpretation of the Quorum Clause creates similar mischief in the wake of a massive attack against the Congress.⁷⁰ The strongest argument for a denominator based on seats filled by chosen, living, and sworn members comes from common sense—the Federal Government should not allow itself to be paralyzed by a violent assault directed against its officials and institutions. If the denominator must include a large number of vacant seats not immediately filled following a terrorist attack, that attack could prevent one or both houses from attaining a quorum, in turn preventing Congress and the Federal

senators); THORPE, *supra* note 55, at 177 (“New York, obedient to the influence of [Anti-Federalist Governor] Clinton, had refused to appoint electors . . .”).

68. See THORPE, *supra* note 55, at 176 (“All through the winter of 1789, the supporters of the Constitution were anxious lest in some way its enemies might yet cause delay, or even overthrow the plan.”); see also Lawson & Seidman, *supra* note 17, at 6, 8 (discussing the need for states to select people to operate the machinery of government during the winter of 1788-1789). The Framers explicitly avoided this problem with regard to the Presidency by requiring that the President win only a majority of votes from electors actually appointed. See U.S. CONST. art. II, § 1, cl. 3. (“The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed . . .”).

69. See THE FEDERALIST NO. 58, *supra* note 8, at 354 (James Madison) (explaining that the quorum requirement was set at a majority so that the minority could not wield too much power with regard to the legislature’s ability to act); see also John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 487 n.14 (1995); see also Records of the Federal Convention, in 2 THE FOUNDERS’ CONSTITUTION 289-90 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting arguments from the Convention as to the best level for the legislative quorum).

70. See CONTINUITY OF GOV’T COMM’N, *supra* note 4, at 9-10 (“A strict interpretation of the constitutional quorum requirement would mean that the House would be unable to act for many months until sufficient vacancies were filled.”); *id.* at 9 (stating that a quorum based on living members in filled seats would ensure that the House could operate with a quorum even after a massive death toll).

Government from functioning, not only in response to the attack itself but also as to the continued needs of governance. To paraphrase Senator Jonathan Bingham, speaking to the effect of southern secession on the ratification of the Reconstruction Amendments, it is simply inconceivable that the Constitution enables the planners of a large-scale terrorist attack to interfere with its operations.⁷¹

The argument against a smaller quorum focuses on the unrepresentativeness of a small body wielding legislative power.⁷² A rump Congress of 101 representatives or thirty-one senators may be unrepresentative politically, geographically, and ideologically, possibly lacking representatives from some states.⁷³ It may be different from the full Congress, with dramatic policy changes as a potential consequence. The small size might raise doubts as to the broader democratic legitimacy of its actions.⁷⁴ There also is a risk that a small quorum could be carried to the extreme. For example, if the House of Representatives had only nine living members after an attack, the presence of five (all from, for example, small Western States) would constitute a quorum to carry out

71. See Harrison, *supra* note 54, at 421 (discussing arguments by Senator Bingham that southern ratification of the Civil War Amendments was unnecessary because “it is simply inconceivable that the Constitution allows traitors so to interfere with its operation”).

72. See THE FEDERALIST NO. 56, *supra* note 8, at 342 (James Madison) (addressing charges that the House of Representatives would “be too small to possess a due knowledge of the interests of its constituents”); see also Wasserman, *supra* note 2, at 320 (describing constitutional opponents’ “fear that a small legislative body is a poor depositary of the public interest, lacking necessary knowledge of constituents’ interests”).

73. See U.S. CONST. art. I, § 2, cl. 3 (“[E]ach State shall have at Least one Representative”); Wasserman, *supra* note 2, at 313 (emphasizing problems of having long periods with a small House that may not include representation for all states).

74. See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 404 (2004) (describing one cost of legislative absences as “the loss of legitimacy said to result when the legislature proceeds without a full complement or even majority participation”); see also THE ADDRESS AND REASONS OF THE DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 247-48 (Ralph Ketcham ed., 1986) (objecting to the fact that, with only sixty-five members and a quorum requirement of thirty-three, seventeen people could determine the sense of the House of Representatives). On the other hand, we could conceive of a catastrophic event after which the problem would not be that the rump House is too small, but that the full House is too large. Imagine that terrorists release a fatal plague or virus across the United States that kills a large percentage of the country’s population, akin to the effects of the Black Death in Europe in the Middle Ages. That attack might reduce the population of the country so drastically as to require a reduction in the size of the House, which cannot exceed one representative for every 30,000 people. See U.S. CONST. art. I, § 2, cl. 3. Representation is determined according to the results of a decennial census, see *id.*, so any adjustment in the House would not occur until the next census. In the meantime, the skeletal House may, in fact, be more proportional to the population.

House business and a vote of three would be sufficient to enact legislation.⁷⁵

These potentially valid objections sound in policy (as opposed to constitutional) concerns.⁷⁶ They do not rebut the conclusion that each house possesses constitutional power to establish a quorum (particularly for use in the emergencies considered here) based on a denominator of elected, sworn, and living members. Permitting Congress to proceed in rump fashion under a quorum of a majority of living members is the only way to ensure immediate continuity in the hours and days following an attack.

Several considerations mitigate the policy objections to the small Congress. Under the Constitution of 1787, the House of Representatives consisted of sixty-five members, with a census to be taken (and representation adjusted accordingly) after three years.⁷⁷ Opponents of the Constitution argued that this House was too small and unrepresentative, and that a small legislative body was a poor repository of the public interest, lacking necessary knowledge of constituents' interests.⁷⁸ But Madison recognized the necessity of occasional departures from preferred selection processes to handle emergent situations. He defended the small size as a necessary temporary regulation, lasting only until more permanent (and structurally sound)

75. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 9.

76. See Harrison, *supra* note 54, at 378 n.11 ("Whether the houses should have acted on any major questions, including a constitutional amendment, while a substantial part of the country was unrepresented was a question of policy, not power."). To the extent constitutional concerns remain with the small quorum, the adjusted language of Senator Cornyn's amendment, granting Congress power to provide by law for mass vacancies notwithstanding other limitations with regard to congressional rules or quorums, would be sufficient to grant power to each house to establish an emergency small-quorum rule applicable only in the immediate continuity stage following an attack on Congress. See *supra* notes 34-41 and accompanying text.

77. See U.S. CONST. art. I, § 2, cl. 3; THE FEDERALIST NO. 55, *supra* note 8, at 339 (James Madison). The House that convened in April 1789 only had fifty-nine members; North Carolina, which had five seats, and Rhode Island, which had one seat, had not yet ratified the Constitution. See Wasserman, *supra* note 2, at 320 n.170. James Madison's stated expectation was that the House would grow to over 100 members following that first census, to 200 after twenty-five years and to 400 after fifty years. See THE FEDERALIST NO. 55, *supra* note 8, at 339 (James Madison). But see SPEECHES OF MELANCTON SMITH (1788), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 74, at 346 (arguing that there is no guarantee that such increases will be made, because the issue is left to Congress itself).

78. See SPEECHES OF MELANCTON SMITH, *supra* note 77 ("[T]he number fixed in the Constitution, is not sufficient without it is augmented."); cf. THE FEDERALIST NO. 55, *supra* note 8, at 340 (James Madison) ("[T]he liberties of America cannot be unsafe in the number of hands proposed by the federal Constitution."); THE FEDERALIST NO. 56, *supra* note 8, at 342 (James Madison) (addressing charge that the House would "be too small to possess a due knowledge of the interests of its constituents").

regulations could be put in place.⁷⁹ The small sizes of both houses (and of their respective quorums) in the immediate continuity stage similarly would be the temporary product of the extreme emergency, lasting only until the next stage of the continuity process. So long as speedy repopulation processes are in place,⁸⁰ a few days of a small Congress becomes less troubling.

Moreover, the checks of bicameralism and separation of powers constrain the ability of one small house to abuse its ability to act. A small House of Representatives (even one in which five members constitute a quorum and three members can enact legislation) cannot unilaterally do anything substantial unless a working Senate and a President concur. The small-House-run-amok argument assumes an unlikely partisan or ideological capture of all three political departments and members acting on that capture. Such blatant partisan political abuse of the process seems unlikely, especially in a time of national crisis.

Finally, each house could impose a minimum number of living members below which a small quorum would not be possible. One possible floor could be (for purely historical reasons) the sixty-five representatives (quorum of thirty-three) or twenty-six senators (quorum of fourteen) established in the original Constitution. Below those floors, each house could not function until the second stage, interim repopulation. This may strike an acceptable temporal balance between needing a functioning Congress in the immediate aftermath of an attack and not wanting an unacceptably small and unrepresentative Congress wielding national legislative power.⁸¹

B. Repopulation

The need for more permanent and structurally sound selection regulations moves the process quickly into the next stage, repopulation. The point of repopulation is to fill the seats rendered vacant by the deaths of large numbers of members in each house and to bring both houses back to full working capacity.⁸² The risks associated with a small, unrepresentative Congress wielding legislative power can be alleviated primarily by ensuring that the immediate continuity stage (with Congress

79. See THE FEDERALIST NO. 55, *supra* note 8, at 339 (James Madison). The longer-term regulation for the House would be the reapportionment after the first census and every subsequent decennial census and the continued growth of the House along with the growth of the country. See *id.*

80. See *infra* notes 82-114 and accompanying text.

81. See *infra* notes 178-87.

82. See Wasserman, *supra* note 2, at 321 (arguing that the immediate continuity phase is the product of the extreme emergency and should last only until vacancies can be filled by the several states through immediate appointments and popular elections).

operating in rump form) lasts only for a sharply limited time. Repopulation then subdivides into two stages: interim repopulation and final repopulation.

1. Repopulation: Interim and Final

Final repopulation is the end-game of the process, requiring that all seats be filled and both houses be at full working capacity, with all members chosen via the procedure ordinarily used to select members of both houses of Congress—direct popular election via near-universal adult suffrage.⁸³ One could argue that Congress has been repopulated only if both houses are at full capacity with all or almost all members having been popularly elected. At the same time, there is general agreement that elections cannot take place within one week of an attack, although disagreements exist as to how quickly elections could occur.⁸⁴ Assuming special elections realistically might be held within approximately three or four months, there must be a bridge from immediate continuity under the rump Congress to final repopulation by popular election.

That bridge is interim repopulation, during which stage new members are brought into both houses, not according to preferred selection procedures, but through an expedited process. Each house gains the expected number of members (435 in the House, 100 in the Senate) and is at or close to full working speed, but some of those members are selected in a different, potentially less democratic manner.

The model for two-stage repopulation is the Senate under the Seventeenth Amendment. Senate vacancies are filled by statewide election, but a state legislature may grant the governor the power to make temporary appointments until an election can be held.⁸⁵ Forty-eight state legislatures have delegated power to make temporary appointments,⁸⁶ with appointees serving until a new senator is chosen at

83. See *infra* note 120.

84. See *infra* notes 146-68 and accompanying text.

85. Clause 2 of the Seventeenth Amendment states:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. CONST. amend. XVII, cl. 2.

86. See, e.g., ALA. CODE § 36-9-7 (Supp. 2001) ("The governor may make temporary appointment of a senator in the senate of the congress of the United States from Alabama whenever a vacancy exists in that office, the appointee to hold office until his successor is elected and qualified."); CAL. ELEC. CODE § 10720 (Deering 1995). Section 10720 states that:

the next scheduled statewide election or at a special election called by the governor.⁸⁷ Senate appointments can be made almost immediately, certainly within one week of the vacancy,⁸⁸ bringing the Senate back to full or near-full capacity and moving the process from immediate continuity to interim repopulation. The election, whenever it occurs, then moves the Senate to final repopulation.

The Senate model presently is inapplicable to the House of Representatives, for which new election remains the only means of filling vacant seats.⁸⁹ Under the current structure there is no interim repopulation in the House, only final repopulation once an election is held; the seat remains vacant in the meantime.

The most obvious solution is to apply the Senate model to the House. I previously have argued for a constitutional amendment establishing House appointments.⁹⁰ This also was the central recommendation of the Continuity of Government Commission in its report on continuity of Congress,⁹¹ as well as the substance of numerous congressional proposals after 9/11.⁹² The pending Senate plan amends the Constitution to make

If a vacancy occurs in the representation of this state in the Senate of the United States, the Governor may appoint and commission an elector of this state who possesses the qualifications for the office to fill the vacancy until his or her successor is elected and qualifies and is admitted to his or her seat by the United States Senate.

Id.; FLA. STAT. § 100.161 (1997) (“[T]he Governor may make a temporary appointment until the vacancy is filled by election.”); WASH. REV. CODE ANN. § 29.68.070 (2003) (“When a vacancy occurs in the representation of this state in the senate of the United States, the governor shall make a temporary appointment to that office until the people fill the vacancy by election . . .”).

87. *See, e.g.*, CAL. ELEC. CODE § 10720 (Deering 1995) (“An election to fill a vacancy in the term of a United States Senator shall be held at the general election next succeeding the occurrence of the vacancy or at any special election.”); DEL. CODE ANN. tit. 15, § 7321 (1999) (“[T]he Governor may make a temporary or ad interim appointment . . . to fill such vacancy until the same shall be filled at the next ensuing general election in the manner prescribed by law.”); *see also* CONTINUITY OF GOV'T COMM'N, *supra* note 4, app. V, at 37-43 (enumerating time requirements in all fifty states for holding a special election to fill a House vacancy).

88. *See* CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 6 (“Senate vacancies are, in practice, filled almost immediately by gubernatorial appointment.”).

89. *See* U.S. CONST. art. I, § 2, cl. 4; *see also* CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 6 (“A special election is the only method for filling House vacancies.”); Wasserman, *supra* note 2, at 305 (stating that popular election is the exclusive method of choosing House members and neither the states nor Congress can, under the current Constitution, create new or additional mechanisms).

90. *See* Wasserman, *supra* note 2, at 312.

91. *See* CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 14-15 (urging adoption of the same procedure used by the Senate under the Seventeenth Amendment).

92. *See, e.g.*, H.R.J. Res. 67, 107th Cong. (2001); H.R.J. Res. 77, 107th Cong. (2001); S.J. Res. 30, 107th Cong. (2001).

House appointments permissible, then delegates to each state the power to establish appropriate procedures to fill vacancies in its congressional delegation, with one option being the Senate model of gubernatorial appointments followed by expeditious special elections.⁹³

Application of the Senate model to the House raises the additional issue of who should make appointments. Because senators originally were selected by state legislatures and were perceived (as they are today) as representing entire states,⁹⁴ leaving temporary Senate appointments with state government was not inconsistent with the newly populist Senate. Governors and senators represent the same polyglot statewide electoral constituencies,⁹⁵ so the appointments likely would reflect the popular will. Moreover, gubernatorial appointments to the House would unify interim repopulation in Congress as a whole—the same state official would fill all vacancies in that state’s congressional delegation at one time, better guaranteeing that seats would be filled quickly in the wake of an attack.

But a governor’s statewide electoral constituency may be significantly different from the more local constituency of a House member from one district within the state.⁹⁶ This difference perhaps demands a different appointing authority for House members. One suggested alternative is to have each representative predesignate a successor for the interim repopulation stage; that successor would assume the seat should the elected member be killed in the attack and would serve until an election and final repopulation can take place.⁹⁷ The expected benefit of

93. See S.J. Res. 23, 108th Cong. (2003); Continuity of Congress Act of 2003, S. 1820, 108th Cong. § 2(a) (2003); see *supra* notes 34-35 and accompanying text.

94. See Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1507 (1994) (“Senators represent states . . .”).

95. See Fitzgerald, *supra* note 8, at 749.

96. See Amar & Amar, *supra* note 13, at 130 (discussing the “narrow, local strategies by which Congressmen secure election in their states and districts, with promises of pork and parks”); Fitzgerald, *supra* note 8, at 748 (“The citizen within her House constituency thus may identify herself and her political priorities primarily on the basis of local concerns.”); Wasserman, *supra* note 8, at 361 (stating that House members are elected by the smallest constituency of voters); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 552 (1954) (emphasizing the localism and separatism of the House).

97. See *Congressional Continuity Hearing*, *supra* note 4 (statement of Rep. Brian Baird), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2569 (arguing for a constitutional amendment authorizing sitting House members to identify potential designees who would temporarily assume the representative’s duties until special elections could be held); see also Thomas S. Foley & Newt Gingrich, *If Congress Were Attacked*, WASH. POST, Mar. 17, 2002, at B9. It will be necessary to amend the Constitution to grant the House the power to establish the predesignation procedure by rule. See CONTINUITY OF GOV’T COMM’N, *supra* note 4, at 21-22 (concluding that granting the power of

predesignation is a successor who is ideologically, demographically, and politically similar to the elected member and to the voters of that district. A governor and representative also may be of different political parties, so a unilateral gubernatorial appointment may bring about a change in party control of the seat and, in a closely divided body with a number of such appointments, a change in party control of the House itself.⁹⁸

Exclusive appointment by a representative is problematic from the basic policy standpoint that it empowers an elected official unilaterally to choose a contingent successor—a novel and democratically troubling power.⁹⁹ Currently, the only federal official who selects a contingent successor is the President, who, either in reality or in practical effect, appoints her Vice President.¹⁰⁰ Importantly, however, that appointment is not unilateral.¹⁰¹ This plan, by contrast, empowers a member of the House to designate a contingent successor without any consideration of that successor or her qualifications by the voters or anyone outside of the member herself.¹⁰²

The best solution is a combination of gubernatorial appointments and predesignation: the House member provides the governor of her state with an advance list of potential, constitutionally eligible successors and the governor must choose from those on the list.¹⁰³ Congress could speed

predesignation solely through House rule is unconstitutional); Wasserman, *supra* note 2, at 305 (arguing that selection of interim members by current members is not related to rules of proceeding or operations, and thus a House rule authorizing each member to predesignate a successor would not be permissible under the current Constitution).

98. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 23; Wasserman, *supra* note 2, at 313.

99. See Special Message to the Congress on the Succession to the Presidency, 145 PUB. PAPERS 129 (June 19, 1945) (arguing that officials in a democracy should not appoint their own contingent successors).

100. The President appoints the Vice President in two situations: when she chooses a running mate and when she appoints a new Vice President to fill a vacancy in that office under the Twenty-fifth Amendment. See Wasserman, *supra* note 8, at 407-08.

101. A Vice Presidential appointee must be confirmed by both houses of Congress, and a Vice Presidential candidate at least nominally stands before the national electorate for consideration and approval as part of the Presidential candidate's ticket. See Wasserman, *supra* note 2, at 313-14; Wasserman, *supra* note 8, at 407-08.

102. The House judges whether to seat an individual member. See U.S. CONST. art. I, § 5, cl. 1. But the House is "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." *Powell v. McCormack*, 395 U.S. 486, 522 (1969). Moreover, the Constitution does not grant to the House the power to appoint a different, more acceptable member to a seat if it rejects another's credentials or qualifications. See Wasserman, *supra* note 2, at 305.

103. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 28-29. Other sources have suggested a range of alternative appointing authorities, including the President, the Supreme Court, state legislatures or committees of state legislatures, or the remainder of Congress; all fail for reasons described at length by the Continuity of Government

the emergency appointment process in both houses by requiring that all appointments in the wake of mass destruction be made from a list of contingent appointees for each seat prepared by that seatholder at the beginning of every Congress.¹⁰⁴ Because the identity of the appointee would be known before any emergency creates a vacancy, appointments could be made more quickly once mass vacancies occur.

The list of potential appointees, as well as details of their backgrounds and qualifications, also should be made public from the outset, adding a degree of popular accountability to the appointment process.¹⁰⁵ The public might challenge a governor in advance if proposed appointees are viewed as unqualified or unpopular or if the governor is seen as attempting to work a dramatic shift in ideology or party affiliation of Congress through her proposed contingent appointments to the state congressional delegation.¹⁰⁶ The people also might influence the identities of potential congressional appointees, aligning the designated contingent appointee more with popular will long before the appointment will be made (and before we even know if an appointment would have to be made).¹⁰⁷ Even if we expect little political gamesmanship during a national crisis,¹⁰⁸ the public and member predesignation can check the attempt or inclination to take partisan or

Commission. See *id.* at 28. The only suggestion with some potential validity would be selection by the full legislature of a state, which is how senators were chosen prior to the Seventeenth Amendment. See U.S. CONST. art. I, § 3, cl. 1 (providing that senators shall be chosen by the legislature of the state). Legislative appointments perhaps produce a more democratically valid successor, because the range of interests and ideas reflected in the legislature may produce a more broadly representative candidate than would gubernatorial appointment. Ultimately, I agree with the commission that the need for a speedy appointment weighs against the type of slow deliberativeness that would characterize selection by a large body. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 28.

104. See H.R.J. Res. 83, 108th Cong. § 1 (2003); CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 28 (discussing gubernatorial appointments from a list drawn up in advance by each house member); Wasserman, *supra* note 2, at 322 ("Congress could require each governor to prepare an advance list of possible appointees for each seat in its congressional delegation . . ."); see also *Constitutional Amendment Hearing*, *supra* note 9 (statement of Sanford Levinson), http://judiciary.senate.gov/testimony.cfm?id=1022&wit_id=2919 ("My own preference would be to have each member of Congress deposit with the Governor a letter containing a short list of preferred successors, should the occasion ever arise, with the Governor required to choose from that list.").

105. See Wasserman, *supra* note 2, at 322.

106. See *id.* at 314 ("A Democratic governor who, in the wake of a terrorist attack, appoints ten Democrats to replace an evenly split House delegation might pay a political price.").

107. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 29 (discussing the legitimacy placed on appointees selected by governors from a list prepared by the deceased members the appointees are to replace).

108. See *id.* at 23, 24.

ideological advantage of a potential tragedy through temporary appointments.

The uniquely populist nature of the House and the mass-destruction scenario do compel changes in the process of gubernatorial appointments, both to preserve the nature of the House and to ensure its speedy repopulation. It is here that Congress plays a role in coordinating and unifying the interim repopulation stage among the several states. First, all appointments should be made within seven days, strictly limiting the time in which either house functions in skeletal form and moving quickly into repopulation.¹⁰⁹ Second, temporary House appointments (unlike Senate appointments) should be limited only to the extreme emergency of mass vacancies, but not a small number of vacancies in the ordinary course. A drop from 435 to 430 House members does not warrant appointments; only if some significant threshold of members have been killed should appointments be made.¹¹⁰

Finally, Congress should limit the time an unelected appointee occupies a congressional seat by speeding the move from interim repopulation to final repopulation; this reinforces the democratic legitimacy of Congress by filling every legislative seat with a duly elected (as opposed to appointed) member as quickly as possible.¹¹¹ Unfortunately, outside of the emergency, mass-destruction scenario, states generally take too long to hold special elections. Senate

109. See H.R.J. Res. 67, 107th Cong. (2001) (proposing a constitutional amendment requiring appointments "as soon as practicable (but in no event later than 7 days) after the member's death or incapacity has been certified"); S.J. Res. 30, 107th Cong. (2001) (proposing constitutional amendment containing similar requirement); see also Wasserman, *supra* note 2, at 322 (suggesting that Congress demand that each state provide for temporary appointments within seven to fourteen days).

110. The proposed constitutional amendments authorizing House appointments all have included a high threshold number of seats that must be vacant (or occupied by incapacitated members) in order for the appointment power to take hold. See, e.g., S.J. Res. 23, 108th Cong. (2003) (proposing a constitutional amendment empowering Congress to provide by law for the naming of temporary House members whenever one-fourth or more of the seats are vacant); H.R.J. Res. 83, 108th Cong. § 2 (2003) (proposing amendment allowing for appointments when a "majority of the whole membership of the House of Representatives are unable to carry out their duties"); S.J. Res. 30, 107th Cong. (2001) (proposing a constitutional amendment authorizing House appointments whenever fifty percent of House members are unable to carry out their duties); H.R.J. Res. 77, 107th Cong. (2001) (proposing a constitutional amendment empowering Congress to provide by law for the appointment of temporary members whenever thirty percent or more of the seats are vacant); H.R.J. Res. 67 (proposing a constitutional amendment authorizing House appointments whenever "25 percent or more of the members of the House of Representatives are unable to carry out their duties because of death or incapacity"); see also CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 27 (discussing the need for a high threshold in order to trigger an emergency temporary appointments).

111. See Wasserman, *supra* note 2, at 319.

appointees tend to serve until the next regularly scheduled statewide election.¹¹² As for the House, from the Ninety-ninth through the 107th Congress, it took an average of 126 days to hold elections, with seventy-four days being the shortest time between vacancy and election.¹¹³ Such delays are intolerable when 334 House seats are vacant simultaneously or are filled by appointees. Thus, Congress must require that each state hold special congressional elections in an expedited manner, within three or four months of the attack and the resultant mass vacancies.¹¹⁴

2. *Objections to the Senate Model as Applied to the House*

The explicit call in June 2003 by the Continuity of Government Commission for a constitutional amendment applying the Senate model of temporary appointments and special elections to the House was met with immediate heated opposition, particularly from members of the House itself. They suggested that having appointed, rather than popularly elected, members in the House, even for a defined short period, destroys the fundamental democratic character of the House and

112. See, e.g., CAL. ELEC. CODE § 10720 (Deering 1995) ("An election to fill a vacancy in the term of a United States Senator shall be held at the general election next succeeding the occurrence of the vacancy . . ."); DEL. CODE ANN. tit. 15, § 7321 (1999) (providing for appointees to serve until the seat "shall be filled at the next ensuing general election in the manner prescribed by law").

113. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 7, app. IV, at 36; *Congressional Continuity Hearing*, *supra* note 4 (statement of Norman J. Ornstein), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2565; *id.* (statement of Sen. Orrin G. Hatch), http://judiciary.senate.gov/member_statement.cfm?id=909&wit_id=51.

114. See S.J. Res. 23 (proposing a constitutional amendment providing that any procedure established for filling vacancies expire no later than 120 days after the vacancy, with a possible extension); H.R.J. Res. 67 (proposing a constitutional amendment requiring special election within ninety days of the appointment of a temporary House member); S.J. Res. 30 (proposing constitutional amendment requiring special election within a ninety-day period following the vacancy); see also CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 29 (suggesting that the special election be held within 120 days of the vacancy). I previously have argued that special congressional elections should be held within six months, in part because a special Presidential election also should be held within six months whenever a double vacancy places a § 19 statutory successor in the White House. See Wasserman, *supra* note 2, at 317-19; Wasserman, *supra* note 8, at 410-11. If fifty states are going to hold popular elections for President (or more precisely for Presidential electors) within six months of an attack on the Government, new members of Congress should be selected at the same time, rather than requiring states to conduct two sets of elections in the wake of a national catastrophe. The difference between the interim repopulation stage in Congress lasting four months and six months is insignificant, so long as Congress is functioning at full capacity with appointed members during that time. One response to this concern would be for Congress to provide that the timing of special congressional elections is contingent on whether the same attack also created an executive double vacancy—elections will be held within six months if a § 19 Presidential election must take place, otherwise within four months.

the right of the people to select the members of that body.¹¹⁵ At the heart of these objections is the belief in a "People's House"; members are chosen by the people via direct election and only may be chosen by the people, even if that means no functioning House (or Congress) until those elections can take place.¹¹⁶

These arguments all cite the Framers' desire to hold the House, as distinct from the Senate, as a unique body subject exclusively to selection by the people.¹¹⁷ It is true that the original constitutional design sought a sharp line between the People's House and the States' Senate.¹¹⁸ But that

115. H.R. REP. NO. 108-404, pt. II, at 3 (2004) ("The House is rooted in democratic principles, and those principles must be preserved."); see *Congressional Continuity Hearing*, *supra* note 4 (statement of Rep. David Dreier), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2568 ("[W]e want to preserve our distinct quality of being sent as elected representatives of the people."); *id.* ("[T]he Framers intended that such important decisions should be made in the House not by someone who is selected for the people, but by someone who is elected by the people."); *id.* (statement of Sen. Patrick Leahy), http://judiciary.senate.gov/member_statement.cfm?id=909&wit_id50 ("More than any other Federal body, the House of Representatives reflects the Founders' belief that the people should choose their leaders, and that those leaders should be directly accountable to the people."); see also Press Release, Representative F. James Sensenbrenner, Sensenbrenner Statement upon Introduction of "Continuity of Representation Act" (July 24, 2003), <http://www.house.gov/judiciary/news072403.htm> ("Such an amendment would destroy the uninterrupted tradition that only Members duly elected by their local constituents should serve in the House. Even worse, such an amendment would take away the people's right to choose representation.").

116. See H.R. NO. 108-404, pt. II, at 3 ("[T]he very adoption of such an amendment itself would strike a fatal blow to what has otherwise always been 'The People's House.'"); *Congressional Continuity Hearing*, *supra* note 4 (statement of Rep. David Dreier), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2568 ("[A]s the 'Peoples' House,' we have never contemplated appointment . . ."); *id.* (statement of Sen. Patrick Leahy), http://judiciary.senate.gov/member_statement.cfm?id=909&wit_id50 (describing concern that appointing members "would involve a fundamental departure from our constitutional heritage"); see also CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 22 ("The House of Representatives is rightly called the 'people's house,' as it is the representative body closest to the people with elections held every two years.").

117. See H.R. REP. NO. 108-404, pt. II, at 3 ("James Madison used the strongest of terms when stating the House must be composed only of those elected by the People."); *Congressional Continuity Hearing*, *supra* note 4 (statement of Rep. David Dreier), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2568 ("The Framers of the Constitution . . . wisely created a House and Senate with differing size, constituency, term of office, procedural rules, duties, and prerogatives."); see also Sensenbrenner, *supra* note 115 ("James Madison used the strongest terms when stating the House must be composed only of those elected by the people. . . . Far from envisioning a system in which state governors appointed those who would serve in the House, Madison wrote that '[t]he electors are to be the great body of the people of the United States.'").

118. See THE FEDERALIST NO. 39, *supra* note 8, at 229 (James Madison) ("The House of Representatives, like that of one branch at least of all State Legislatures, is elected immediately by the great body of the people. The Senate . . . derives its appointment indirectly from the people."); *id.* at 212 ("The House of Representatives will derive its powers from the people of America The Senate, on the other hand, will derive its

clear line blurred with the Seventeenth Amendment,¹¹⁹ which instilled the same method of selection for both houses: direct popular election via near-universal adult suffrage.¹²⁰ Each house retains certain distinct characteristics, as their members serve for different periods of time and represent distinct constituencies and concerns.¹²¹ The House remains the more populist and representative; individual members are elected by a smaller, localized pool of voters, stand for consideration before the voters more frequently, and deal with more local concerns and issues.¹²² Senators, even if popularly elected, stand before the voters less frequently and still represent a broader, more diverse constituency.¹²³ The Senate also remains the only legislative body in the United States at

powers from the States as political and coequal societies"); see also Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1352 (1996) ("[T]he Framers and ratifiers of the original Constitution chose legislative election largely to safeguard the existence and interests of the state governments. Indeed, the legislative election device was explicitly linked to the famous Madisonian compromise by which the States were given equal suffrage in the Senate."); Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 509 (1997) ("[T]he Senate should counter the democratic excesses of the people, newly represented in the House of Representatives.").

119. See U.S. CONST. amend. XVII, cl. 1; Amar, *supra* note 118, at 1352-55 (tracing the history of the move to direct election of senators); Bybee, *supra* note 118, at 536-47 (same).

120. See U.S. CONST. art. I, § 2, cl. 1 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id.* amend. XVII, cl. 1 ("The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."); see also Abner J. Mikva, *Doubting Our Claims to Democracy*, 39 ARIZ. L. REV. 793, 798 (1997) ("[W]e have come as close to universal suffrage as any country in world history."); Wasserman, *supra* note 8, at 393 & n.200 (arguing that several constitutional amendments have expanded the electorate to more than seventy-five percent of the population).

121. See Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMMENT. 481, 513 (1997) ("House districts are usually less populous than states, [and] House elections [are] more frequent than those for the Senate"); Bybee, *supra* note 118, at 546 ("At some theoretical level senators had always represented the people, so that the change to direct election was no change in constituency."); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1093 (1994) ("The Framers' constitutional system as it works today creates three different and independent electoral constituencies: the President's (and Vice President's) national constituency, each Senator's constituency of one state, and each Representative's constituency of one of the 435 congressional districts."); Wasserman, *supra* note 8, at 377 (arguing that the House and Senate "remain distinct departments chosen by distinct electoral constituencies . . . different voices of the People speaking through . . . different channels").

122. See *supra* note 96 and accompanying text.

123. See Fitzgerald, *supra* note 8, at 749 ("[A] Senate constituency may take on the more polygot character of the state as a whole.").

any level of government in which representation is not allocated according to population.¹²⁴

But differences between the two houses no longer are grounded in manner of selection;¹²⁵ the two houses no longer are filled differently, at least in the ordinary course. If temporary gubernatorial appointments do not offend the (newly) democratic nature of the Senate, there is no reason a similar procedure should offend the democratic nature of the House in emergency situations. To the extent meaningful differences between the houses remain, we may accommodate them by adjusting the rules and scope of emergency House appointments as compared to Senate appointments.¹²⁶

Moreover, opponents of applying the Senate model of two-stage repopulation in the House take the views of the Framers out of context. For example, Representative James Sensenbrenner cited James Madison as arguing that elections are the only way to ensure that the House has an intimate sympathy with and dependence on the people.¹²⁷ In fact, Madison spoke of *frequent* elections as the necessary policy, not elections themselves.¹²⁸ No one is suggesting that representatives should not be

124. See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (holding that state legislative bodies must be apportioned according to population). The Court rejected, as a violation of the Equal Protection Clause, a state legislative apportionment plan under which each county was given one representative in one house of the State legislature, regardless of population in the county. *Id.* at 575. This holding forced the Court to explain why the U.S. Senate alone could deviate from that pattern. See Bennett, *supra* note 121, at 485. The Court explained it as follows:

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government.

Reynolds, 377 U.S. at 574; *id.* at 573 (“[T]he Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted.”). Compare Bennett, *supra* note 121, at 500 (arguing that the Senate model generally is accepted), with Robin West, *Tom Paine’s Constitution*, 89 VA. L. REV. 1413, 1446 (2003) (“Why is there not, for example, an urban-based movement to eradicate the heightened representation of sparsely populated parts of the country occasioned by our bicameral system of unequal representation?”).

125. See Bybee, *supra* note 118, at 546-47 (arguing that the change in mode or manner for choosing senators meant that the states would be represented only as territorial entities in which people resided, rather than as political entities).

126. See *supra* notes 103-14.

127. See Sensenbrenner, *supra* note 115 (“Madison wrote in the Federalist Papers that elections are ‘unquestionably the only policy’ by which the House can have ‘an intimate sympathy with the people.’”).

128. See THE FEDERALIST NO. 52, *supra* note 8, at 321 (James Madison).

chosen by popular vote or that House elections should be held any less frequently than the two years established in Article I. In fact, proponents of temporary appointments recognize the need for an additional, expedited election within a few months of any appointment, perhaps long before the next scheduled biennial election.¹²⁹

Critics also have quoted Alexander Hamilton for the proposition that “direct election by the people, and NOT selection . . . is the only way to ensure a national government.”¹³⁰ This again takes the point out of context. Hamilton argued that the security of the National Government demanded that House elections be subject to regulation by the National Government itself, as opposed to being left exclusively to the states, where elections could be held up by state or local inaction.¹³¹ Hamilton was concerned that states (or factions within states) “could at any moment annihilate [the National Government] by neglecting to provide for the choice of persons to administer its affairs.”¹³² This has nothing to do with an absolute requirement that elections be held, only with who controls the time, place, and manner of holding those elections.

In reality, the insistence that the Framers did not want House appointments is a non sequitur in the debate. The question is whether the current generation should amend the Constitution to establish its own structural preferences, which often entails major changes to the overarching governmental system.¹³³ A key purpose of Article V is to enable the system to respond to situations where experience reveals that existing procedures do not operate effectively or properly in light of developments and circumstances that the Framers did not or could not

129. See Continuity of Congress Act of 2003, S. 1820, 108th Cong. § 2(a)(4) (2003) (“In the case of vacancy . . . the executive authority of the relevant State shall issue writs of election, which shall be held not later than 120 days after any such vacancy occurs.”); see also CONTINUITY OF GOV’T COMM’N, *supra* note 4, at 29 (“[T]he appointment should last until the special election is held to fill the seat, but . . . the special election shall be held within 120 days of the vacancy.”); Wasserman, *supra* note 2, at 319-20.

130. See *Congressional Continuity Hearing*, *supra* note 4 (statement of Rep. David Dreier) (citing THE FEDERALIST NO. 59 (Alexander Hamilton)), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2568.

131. See THE FEDERALIST NO. 59, *supra* note 8, at 363-64 (Alexander Hamilton) (“[T]here is intended to be a general election of members once in two years. If the State Legislatures were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation . . .”).

132. *Id.* at 360.

133. See Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 692-93 (1996) (arguing that some constitutional amendments “worked significant structural changes in the original constitutional framework”).

foresee.¹³⁴ Structural preferences also change over time, whether because the current generation prefers one structural principle to another or because the current generation recognizes that a different procedure better serves a given principle.¹³⁵ The Framers likely never envisioned a single attack or series of coordinated attacks that could kill or incapacitate a large portion of the House or a single event that could deprive Congress of a quorum. Whether the response to this unanticipated contingency should entail a temporary change in the mode or manner of selecting the House, and even a temporary change in the nature of the House, is a judgment for the current Nation to make and instill in the basic charter.¹³⁶ The Framers' views are noteworthy, but do nothing to dispel the merits of the argument for that change.

Finally, no one is suggesting that the House should become an appointed, unelected body, even in the short term. The question is only how to handle the interim period of three, four, or six months between immediate continuity and the popular elections that establish final repopulation. Surprisingly, opponents of the Senate model insist that "every government ought to contain in itself the means of its own preservation,"¹³⁷ but they oppose the clearest means of preserving the House of Representatives.¹³⁸

134. THE FEDERALIST NO. 43, *supra* note 8, at 268 (James Madison) ("That useful alterations will be suggested by experience could not but be foreseen."); *see also* THOMAS PAINE, RIGHTS OF MAN PART THE SECOND: COMBINING PRINCIPLE AND PRACTICE (1792), *reprinted in* COLLECTED WRITINGS 594 (Eric Foner ed., 1995) ("One of the greatest improvements that has been made for the perpetual security and progress of constitutional liberty, is the provision which the new constitutions make for occasionally revising, altering, and amending them."); *cf. Constitutional Amendment Hearing, supra* note 9 (statement of Sanford Levinson), http://judiciary.senate.gov/testimony.cfm?id=1022&wit_id=2919 ("Fortunately, when inevitable imperfections do manifest themselves, 'there is a Constitutional door open.'") (quoting George Washington).

135. *See* Wasserman, *supra* note 8, at 351 ("The creation and application of a selection procedure reflects a choice or emphasis on some principle or principles over others. Choices as to which principle to emphasize can and will change over time, and a change in emphasis will require and produce a different or amended selection method."); *id.* ("Every selection decision can and should be examined . . . to determine . . . whether a different selection procedure would better serve the desired principles.").

136. *See* West, *supra* note 124, at 1421 (describing Thomas Paine's view that the Constitution "should be kept current through a process of continual, popular reformulation, revision, redrafting, and amending").

137. *See* THE FEDERALIST NO. 59, *supra* note 8, at 359-60 (Alexander Hamilton).

138. Rep. Baird testified that:

Ironically, those who insist that nothing other than a House comprised of directly elected members, would, by their insistence, likely leave the entire nation to be governed either by a handful of survivors, who in fact were elected by only a small fraction of the population, or by people who were not elected at all.

Congressional Continuity Hearing, supra note 4 (statement of Representative Brian Baird), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2569.

3. The Need for Interim Repopulation

James Madison defended the small size of the House of Representatives in the First Congress as a temporary regulation that was necessary and intended to last only until a more permanent and structurally sound system could be established.¹³⁹ The same can be said for temporary House appointments—they would be a temporary solution, intended to last only until final repopulation via popular election.¹⁴⁰ There is general agreement that expedited House (as well as Senate) elections would be necessary to fill the large number of seats rendered vacant.¹⁴¹ And the democratic legitimacy of Congress demands that both houses be filled to capacity by popularly elected members as quickly as possible.¹⁴²

The disagreement lies in how quickly those elections can or should occur. In direct response to the Continuity of Government Commission's call for a constitutional amendment importing the Senate model into the House, the House passed the Continuity of

139. See THE FEDERALIST NO. 55, *supra* note 8, at 339-40 (James Madison); *supra* notes 77-80 and accompanying text.

140. See *Congressional Continuity Hearing*, *supra* note 4 (statement of Rep. Brian Baird), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2569 (arguing for a constitutional amendment "to provide for a more orderly and expeditious means of temporarily, and I underscore temporarily replacing House members until special elections can be held").

141. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 29 ("[T]he appointment should last until the special election is held to fill the seat, but . . . the special election shall be held within 120 days of the vacancy."); Wasserman, *supra* note 2, at 319-20 (arguing for special Senate, and perhaps House, elections within six months); see also S.J. Res. 23, 108th Cong. (2003) (proposing a constitutional amendment empowering Congress to address mass vacancies, but requiring that any procedures established would expire within 120 days of the mass vacancies); Continuity of Congress Act of 2003, S. 1820, 108th Cong. § 2(a)(4) (2003) (providing that any special election must occur within 120 days). The insistence that the House be popularly elected demands speedy special elections. But I have suggested previously that House elections may be less necessary, given that the House seat would be contested in a regular election within a relatively short period. Wasserman, *supra* note 2, at 319. Consider the following: A mass terrorist attack occurs six months into a new Congress; the appointees take their seats within one week and the special election occurs six months later. The newly elected member would take her seat with less than one year remaining on the two-year term, which would be contested in a new, regular biennial election later that year. Without denigrating the import of the people's House, one might question whether a special election is worth the time, effort, and cost simply to have a popularly elected member in the seat for eleven months, with a regular election on the horizon. However, given the institutional intensity of the demand for House elections, see *supra* notes 115-38 and accompanying text, I am willing to accept that special elections must follow soon after a large number of House appointments.

142. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 29 (stressing "the importance of placing an elected member in the seat with dispatch"); Wasserman, *supra* note 2, at 319 ("[D]emocracy demands a duly elected legislator in office as quickly as possible.").

Representation Act of 2003.¹⁴³ The version of the bill that passed the House requires that in the event of vacancies in 100 or more House seats, states hold elections within forty-five days, with parties making nominations within ten days.¹⁴⁴ In the meantime, of course, the House either is unable to function or operates in unrepresentative rump form. In the framework of our three-stage process, the bill extends immediate continuity from one week to approximately six weeks. It skips interim repopulation and moves directly from immediate continuity to final repopulation through rushed elections. The plan does have the benefit of establishment via ordinary legislation, rather than constitutional amendment; Congress already possesses power to regulate the time, place, and manner of holding elections for the House and Senate.¹⁴⁵ It obviously is preferable to establish emergency procedures through the ordinary legislative process, rather than through the more difficult and time-consuming constitutional amendment process.

Whether we can pretermitt interim repopulation, as the bill proposes, turns on how quickly elections can take place in the real world. The elections must occur quickly enough to limit sufficiently the length of time in which the House functions only under a small quorum. The question is whether a substantial number (at least 100 under the House bill, 334 under our scenario) of simultaneous congressional elections could be held nationwide less than two months after a 9/11-style attack directed at Congress and the National Government or less than two months after the release of anthrax in the ventilation system of congressional offices.

Two concerns suggest that such a large number of elections could not be carried out under these circumstances. First, there is the procedural

143. H.R. 2844, 108th Cong. (2003). The bill passed the House in April 2004 on a 306-97 vote. H.R. REP. NO. 108-503, at 6 (2004).

144. The original bill called for elections within twenty-one days of the attack, with parties having fourteen days to nominate candidates and seven days to conduct the general election. See H.R. 2844 § 2(b). The bill underwent review in the Committee on the Judiciary after having been marked up and reported out by the Committee on House Administration. H.R. REP. NO. 108-404, pt. II, at 10 (2004). The longer time frames likely were in response to committee testimony from election law experts suggesting that forty-five days was the minimum necessary to conduct an election. See *Congressional Continuity Hearing*, *supra* note 4 (statement of R. Doug Lewis), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2566.

145. See *Congressional Continuity Hearing*, *supra* note 4 (statement of Rep. David Dreier), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2568 ("This approach . . . would allow Americans to 'retain their local voice in Washington . . . without changing the Constitution.'") (quoting House Speaker Dennis Hastert); see also U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .").

problem of whether the several states can execute elections in such an extremely expedited manner. Election law experts suggest that sixty days is the minimum period for holding valid elections.¹⁴⁶ Problems that affect the timing and the ability of states to expedite elections include cost,¹⁴⁷ whether to hold primary elections or whether parties should choose nominees by other means,¹⁴⁸ how to allow time for the process of filing and qualifying candidates at the front end,¹⁴⁹ and the counting and certifying of votes and certification of a winner at the back end.¹⁵⁰ There are also the basic mechanics of securing polling places, hiring election workers, designing and printing ballots, and so on, all of which would become more difficult absent advance notice of the election.¹⁵¹ As one election law expert put it, Congress must be careful not to insist on expedited elections “in such a way to place the process in an overly risky, overly ambitious timetable which courts an additional disaster.”¹⁵² It is not feasible to execute so many elections within a three-week period, particularly without warning in the wake of a 9/11-type attack.¹⁵³

146. R. Doug Lewis testified that:

[E]very day you can grant that gets us closer to 60 days increases the likelihood that the election will mean more to the candidates and the voters and allow us to build in the kinds of quality assurance and integrity processes that have been the hallmark of elections in America.

Congressional Continuity Hearing, *supra* note 4 (statement of R. Doug Lewis), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2566; *id.* (statement of Norman J. Ornstein), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2565 (“[T]here is no way to hold democratic special elections in less than two months under normal circumstances and in the aftermath of an attack, it would be hard to imagine holding such elections within three months.”); CONTINUITY OF GOV’T COMM’N, *supra* note 4, at 19 (estimating that after a catastrophic attack, with large numbers of special elections occurring simultaneously, “even the most expedited elections would take a minimum of three months”).

147. See *Congressional Continuity Hearing*, *supra* note 4 (statement of Thad Hall), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2567 (“For short-notice special elections to be conducted successfully, the federal government should be willing to pay for these elections so that localities have the money they need to do the job right.”); *id.* (statement of R. Doug Lewis), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2566 (noting that it may not be valid to assume that cost can be ignored during a true national emergency).

148. See *id.* (statement of Thad Hall), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2567.

149. See *id.* (statement of R. Doug Lewis), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2566.

150. See *id.*

151. See *id.* (statement of Norman J. Ornstein), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2565.

152. *Id.* (statement of R. Doug Lewis), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2566.

153. In addition, consider that not every seat will become vacant simultaneously. Suppose a member is severely injured in an attack, but does not pass away from her

Advocates for speedy elections insist that “millions of people around the country might fill schools and gymnasiums, churches and meeting halls, and freely exercise, in the wake of a vicious attack by haters of democracy and freedom, their right to chosen representation—a right that has survived uninterrupted throughout the history of the United States.”¹⁵⁴ This misses the point. No one doubts that the people would turn out to exercise the franchise. The problem is the inability of the states realistically to operate the electoral mechanism effectively so that the people are able to exercise the franchise.

The second, substantive, problem with ultraexpedited elections turns on a theoretical question:

What is an election? Is it a date-certain event so that voters can vote, or is it more than that? Is an election in American democracy really a “process” that includes time for the identification of candidates, the ability of candidates to mount a campaign, to raise funds, to attract supporters, to inform the voters of what their choices are between individual contestants, and then going to the polls to make that choice? The point is that if it is only an event, then we can structure an event in a short time-frame and carry off the event as flawlessly as possible. If, however, you define it in the broader “process” terms, then you have to allow the process time to work.¹⁵⁵

The answer, Robert Bennett argues, is that “it is not the vote cast for an official, but the conversation instigated by the prospect of elections that matters to members of the citizenry.”¹⁵⁶ Under Bennett’s conception of “democracy as a meaningful conversation,” the act of voting is important primarily as one part of the conversation.¹⁵⁷ But the act of voting, if divorced from the other elements of a “meaningful conversation,” ceases to be a vital democratic act.

Andrei Marmor similarly suggests that a legitimate democratic decision-making process consists of two stages: deliberation and

injuries until two weeks later. Must the state hold the election for that seat at the same time as the seats that became vacant immediately in the attack? Or will that state have the full forty-five days from the member’s death to conduct the election for the newly vacant seat? If the latter, then states will be conducting seriatim expedited elections, an even more difficult task and an even greater drain on time and resources. If the former, then the election time tables will be shorter for some seats than for others.

154. See H.R. REP. NO. 108-404, pt. II, at 5 (2004).

155. *Congressional Continuity Hearing*, *supra* note 4 (statement of R. Doug Lewis), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2566.

156. Bennett, *supra* note 121, at 512.

157. See *id.* at 503.

decision.¹⁵⁸ During the deliberative stage, “people attempt to influence the result in various ways, by proposing rational (or irrational) arguments, bargains, enticements, and what not.”¹⁵⁹ The deliberative stage includes voters getting to know candidates, candidates informing the voters of their qualifications and plans, and candidates and voters trying to convince one another to vote in a certain way.¹⁶⁰ The decision stage is the actual casting of the vote and it is authoritative only if it follows a broader deliberative process.¹⁶¹

The franchise is meaningful only as the stimulus for, and an ongoing part of, the conversation among the people and between the people and candidates; on this understanding, the quintessential act of self-government is the conversation or discussion, not the decisional casting of the vote alone.¹⁶² To hold a substantial number of elections within twenty-one, forty-five, or even sixty days of a 9/11-style tragedy is to compel the people to cast votes without the benefit of the conversation, deliberation, and discussion that gives the ballot its meaning. It is decision without deliberation, which does not produce legitimate or authoritative democratic outcomes.

The expedited-election plan also necessarily assumes that we are locked into a two-party political system and that voters will cast ballots

158. See Andrei Marmor, *Authority, Equality and Democracy* 18 (2003) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=424612.

159. *Id.*

160. See *Congressional Continuity Hearing*, *supra* note 4 (statement of R. Doug Lewis), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2566 (“Somewhere in here has to be time for voters to find out who is officially on the ballot and to discover information about them.”); see also Bennett, *supra* note 121, at 508 (arguing that the democratic conversation involves a simple two-way exchange between candidates or elected officials and voters, as well as a broader give-and-take among members of the public); Marmor, *supra* note 158, at 18 (“A considerable aspect of political power is determined by people’s ability to influence this process of deliberation.”); cf. *Congressional Continuity Hearing*, *supra* note 4 (statement of Norman J. Ornstein), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2565 (“[S]uch elections could be mere coronations for the rich and famous, who would run without voters knowing much at all about them—and nothing about alternatives to them.”).

161. See Marmor, *supra* note 158, at 18; see also Bennett, *supra* note 121, at 503 (“There does not seem to me to be any plausible explanation for the democratic conversation, including the time and energy devoted to persuasiveness in it, save that periodic, genuinely contested elections make the conversation matter.”).

162. Bennett argues that:

[I]f voting is not the quintessential act of self-government, but rather a pivotal stimulus for, and a part of, an ongoing conversation . . . then it is more natural to think of individuals as valuing voting as part of what gives meaning to a sustained activity that is a component of their everyday lives, of their senses of self.

Bennett, *supra* note 121, at 522-23.

strictly along party lines.¹⁶³ The original version of the Continuity of Representation Act allotted twice as much time (fourteen days) for the parties to nominate candidates as it did for the voters to get to know those candidates once nominated (seven days).¹⁶⁴ The assumption must be that it does not really matter who the candidates are or what they say or whether the voters get to know them; once each major party chooses its standard-bearer in a congressional district, citizens will vote the party label.¹⁶⁵ It further assumes that most House seats are party-safe; the people will vote for the same party as in the most recent regular election, and the seat will remain in the same party hands, even if the seat-holder has changed.¹⁶⁶

The standard view is that voters base their choices on the personal qualities of candidates with whom they have some familiarity, but follow straight party lines when no other information about candidates is

163. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (“[T]he States’ interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system”); *Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (“There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government.”); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 620 (2002) (“It is well established that single-member territorial districting with first-past-the-post winners almost invariably leads to two and only two serious political parties.”).

164. See *supra* note 144.

165. Ironically, while the Act assumes party-line voting, it simultaneously deprives voters of the right to influence party nominations, because a three-to-six-week election cycle almost certainly would force states to dispense with party primaries and nominate in some other manner. See *Congressional Continuity Hearing*, *supra* note 4 (statement of Norman J. Ornstein), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2565 (“While it is perfectly legitimate for a state to bypass the primary system, do we want to mandate that no state would be allowed to have party primaries in selecting candidates for a special election?”); see also CONTINUITY OF GOV’T COMM’N, *supra* note 4, at 19. Eliminating all popular influence in the primary further removes meaningfulness and authoritativeness from the popular vote in the special House election. Cf. *United States v. Classic*, 313 U.S. 299, 318 (1941) (“Where the state law has made the primary an integral part of the procedure of choice, . . . the right of the elector to have his ballot counted at the primary is likewise included in the right protected”); see also Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 661 (2002) (arguing that even if there is a loss of competition in general elections, primary elections remain competitive and allow for meaningful popular influence).

166. See Issacharoff, *supra* note 163, at 643 (“Not every district could have a roughly equal number of registered Democrats and Republicans, and even a purely unmanipulated process would create some safe districts. The distortion comes not from the fact that some districts are safe, but from the fact that some districts are deliberately made noncompetitive”); Persily, *supra* note 165, at 661 (describing the argument that bipartisan gerrymanders create safe seats for one or the other party, irrespective of the particular representative who might benefit).

available.¹⁶⁷ The short time frame in the Act makes it impossible for voters to obtain and deliberate on that information, necessitating more party-line voting. Party-line voting may, in fact, be the way a special election would work in practice.¹⁶⁸ That does not mean we should instantiate it in the very design of the special election process.

The longer it takes to hold a truly deliberative and conversational election, the greater the distinction between interim and final repopulation becomes and the greater the import of the former. Once we recognize that final repopulation demands substantively meaningful popular elections which cannot occur in such a short period of time, we are left with a choice: extend immediate continuity by extending the tenure of the small, unrepresentative rump House or allow for an interim repopulation stage through short-term appointments that create a fully representative House until authoritative deliberative elections can be held. The latter better serves principles of democracy and the ideal of having a House of Representatives that is substantial in size and nationally representative in character.

III. MASS INCAPACITATIONS

A distinct procedural problem arises if the terrorist attack causes not mass deaths, but mass incapacitations—a large number of sworn members of both houses of Congress are alive, but physically unable to perform their duties. Many may be in the hospital suffering from severe burns or from radiation poisoning from a dirty bomb or from the effects of inhaled or cutaneous anthrax or ricin. The Constitution treats the House and Senate the same with regard to mass incapacitations: it makes no arrangements for such a condition.¹⁶⁹

167. Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 196-97 (1993); see also Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHI.-KENT L. REV. 493, 505 (2000) (“[V]oting entails an expression of association in the sense that the extent of electoral participation is influenced by campaign and party activities to mobilize voters who respond to candidates, programs, and organizational efforts.”).

168. See Calabresi, *supra* note 94, at 1528 (describing benefits to candidates from association with a particular party and well-known members of that party); Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1761 (1993) (“[T]he Democrats and Republicans have always been associated with at least a loose clustering of ideological and policy views.”); Wasserman, *supra* note 8, at 376 (“Parties do serve as rough proxies for ideology, or at least for a commitment to some common set of public policies and positions and loose combination of ideological and policy views.”).

169. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 12 (identifying three ways in which mass incapacitation is worse than mass death, notably the fact that both the House and Senate lack procedures to deal with it).

Expand on our post-attack scenario. The House of Representatives has 101 surviving, uninjured members; of the remaining 334, suppose that 100 are dead and 234 are alive but physically unable to perform their legislative functions. Similarly, in the Senate with thirty-one uninjured members, twenty-five of the remaining senators are dead and forty-four incapacitated.

Mass incapacitations create two problems. First, there can be no immediate continuity. Disabled members must count in the quorum denominator; they remain members duly chosen, sworn, and living, whose membership would not have been terminated by resignation or by action of one house of Congress. The apparent denominator under the House quorum rule in our scenario remains 335, including the 101 uninjured members and the 234 incapacitated members and excluding only the 100 dead members. A majority of 168 is necessary for a quorum, unattainable because only 101 members are able to attend. Similarly, the quorum denominator in the Senate is seventy-five, thirty-one uninjured and forty-four alive but incapacitated, and a majority of thirty-eight is unattainable.

Second, congressional seats cannot be repopulated, either interim or final, when they are not vacant. The constitutional triggering language for repopulation is "when vacancies happen";¹⁷⁰ absent a vacancy, the power of the state to fill a seat in either house, whether by appointment or special election, never attaches. The inability of either house to function when a significant number of members are incapacitated continues until one of several events occurs. First, enough incapacitated members recover and return to Congress to allow for a quorum under the existing rule.¹⁷¹ Second, the congressional term ends, in which case a (presumably) new member will be elected to that seat and sworn. Third, incapacitated members die or resign,¹⁷² in which case the seats are rendered vacant (they no longer count in the quorum denominator of members chosen, sworn, and living) and could be filled according to the two-step procedure already described. Fourth, Congress could speed the creation of vacancies in those seats by expelling incapacitated members, which each house can do for any reason on a two-thirds supermajority vote.¹⁷³ In the meantime, of course, the Nation has been without a

170. U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); *id.* amend. XVII, cl. 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies . . .").

171. See *supra* notes 45-79 and accompanying text.

172. Cf. CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 12.

173. See U.S. CONST. art. I, § 5, cl. 2; *Powell v. McCormack*, 395 U.S. 486, 506-07 (1969). Expulsion cannot be an acceptable option. At the most basic level, if

functioning government because one or both houses of Congress have been unable to attain a quorum.

Mass incapacitations may constitute the real threat to the continuity of Congress, because they have not been considered or addressed in existing rules and procedures. The problem demands creativity. The greatest weakness in the Continuity of Representation Act may be its complete failure to address mass incapacitations in the House, as it addresses only vacancies and elections to fill those vacancies.¹⁷⁴ Supporters of the bill appear content to live with a small House or no House until final repopulation, even at the risk of reliance on a unilateral dictatorship of the executive.

The common solution has been to handle incapacitated seats as a subset of vacant seats in both the House and the Senate. Both mass incapacitations and mass vacancies provide grounds for appointment (by whatever appointing authority) of a member to occupy the seat.¹⁷⁵ The appointee to a vacant seat serves three or four months, until the special election can be held. The appointee to the incapacitated seat serves some intermediate period—until the member recovers and returns to office on her own unilateral determination, until the next Congress begins with a member chosen in a regular two-year or six-year election,

incapacitated members count in the quorum denominator, then that house cannot attain the quorum necessary to affect those expulsions. More importantly, expulsion remains an extreme step that neither house should take lightly, especially in a situation in which an attack on the foundation of the National Government has rendered a member temporarily unable to carry out the duties of her office. *See id.* at 548 (emphasizing that the power to expel on a supermajority should be limited to “extreme cases”). Having 234 incapacitated representatives can deprive the House of a quorum for two months, too long to be without a functioning Congress. But it is temporary enough that the remainder of a 101-member rump House, even a two-thirds supermajority of that rump, should not undo the results of 234 popular elections. *See id.* at 522 (“The Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.”). Forcing an injured or ill member out of office “hardly seems a fitting reward for a good and faithful public servant.” Amar & Amar, *supra* note 13, at 136 (making the same argument against a statutory requirement that a Cabinet officer who temporarily acts as President resign his Cabinet post only to lose it when the President recovers and resumes the reins of power).

174. *See* Continuity of Representation Act of 2003, H.R. 2844, 108th Cong. § 2(b)(1) (2003).

175. *See* CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 15; Continuity of Congress Act of 2003, S. 1820, 108th Cong. § 2(a) (2003); *see also* CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 25-26 (proposing long-form constitutional amendment, specifying appointment of acting members to House and Senate seats in which the member is incapacitated, with the appointment ending upon written certification by the member that the inability no longer exists).

or until a vacancy is created by the member's death, resignation, or some other action.¹⁷⁶

Two problems remain with this approach, however. First, there still can be no immediate continuity; both houses could be deprived of a quorum until appointments can be made, perhaps leaving us without a functioning Congress, and thus a government able to enact new legislation or declare war, for one week or more. The second problem is the nature of appointments to incapacitated seats. An acting member of the House or Senate would be a temporary placeholder drawn from outside that seat and outside this Congress. She would be a complete stranger to the office and to the legislative body, lacking any knowledge or familiarity with what has been happening within the body and, more importantly, within that legislator's office. It is troubling to imagine the House comprised of 234 such placeholders, all filling positions for some period of time in a policy environment with which they are unfamiliar. Of course, appointments at the interim repopulation stage always place outsiders in the legislature; the 100 House members and twenty-five senators appointed to vacant seats would be just as much strangers to their seats and to Congress.

The difference is the context and temporal indeterminacy of appointments to incapacitated seats. An appointee to a vacant seat knows that she will serve a definite period until the special election within three to six months. She also might run in the special election, extending her term in the seat on a longer basis.¹⁷⁷ The appointee gains a sense of control or ownership over the seat. Even if only in Congress for a few months, it is her seat and she exercises the full range of representative independence and discretion on behalf of her constituents.

By contrast, appointees to incapacitated seats have no such context for their appointments. The appointee does not know the duration of her service. Because incapacitated seats never reach final repopulation unless the seat becomes vacant, if the elected member does not die or resign but also does not recover (in other words, if the seat does not become vacant), the appointee might remain in office for the duration of that term. If we imagine an attack on January 6 of a new Congress, an

176. At that point, the seat moves through temporary repopulation via appointment and final repopulation via election. We may resolve this concern by providing in enabling legislation that any appointments last no more than six months, subject to extension if a large number of vacancies remain. See S.J. Res. 23, 108th Cong. (2003) (proposing constitutional amendment providing that "[a]ny procedures established . . . shall expire not later than 120 days after the death or inability of one-fourth of the House of Representatives or the Senate," but that appointments may be extended for an additional 120 days if one-fourth of the seats remain vacant or incapacitated).

177. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 29-30 (recommending that appointees to vacant seats be permitted to run in the special election for those seats).

appointee to the House could be in place for two years, an appointee to the Senate for six years. Alternatively, if the regular member recovers quickly, the appointee might hold the seat for only two weeks.

This temporal indeterminacy means the appointee may lack the same independence or the same freedom to exercise her representative discretion. She might act more as a proxy for the disabled member, voting as she believes the regular member would have, rather than with a significant degree of political and policy judgment. Moreover, because no election could be held until the end of the congressional term, she would not have the opportunity to win and hold the seat on a longer, more permanent basis.

One way around the temporal problem of incapacitated seats is for each member of Congress to establish a political advance directive or political "living will."¹⁷⁸ Every member would provide a written statement that in the event of an attack on Congress resulting in the death or incapacity of some substantial number of members, if that member is incapacitated in the attack and unable to perform her duties by a certain time (for example, four months or just prior to the special elections for vacant seats), she resigns her seat.¹⁷⁹ At that point, the seat becomes vacant and could be repopulated via appointment and election. With this rule in place, all appointees, whether to vacant or incapacitated seats, would serve only until the election (unless the appointee wins that election). Every seat in both houses, vacant or incapacitated, would be filled in the post-attack elections that establish final repopulation of Congress.

However, the problem of temporal indeterminacy remains because the member still may return at any time within the four-month window, sending the appointee home and halting the special election for that seat. Meanwhile, the appointee might continue to lack that independence and discretion in what may be a time of important legislative activity in Congress, including the declaration of war or authorization of other aggressive military and law enforcement activity.¹⁸⁰

178. I thank Thomas Baker for suggesting this concept.

179. This written statement would be part of the same declaration in which each member lists the potential appointees from whom the governor could choose if the seat becomes vacant in the attack. See *supra* notes 94-108 and accompanying text.

180. See U.S. CONST. art. I, § 8, cl. 11. Congress enacted significant military and national security legislation in the months following 9/11. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (establishing provisions regarding law enforcement, investigation, and prosecution of terrorist activities); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the President to use force against terrorist groups in response to September 11 attacks, including the Taliban Government that supported Al-Qaeda);

For purposes of discussion, we might consider an alternative. Do not make appointments to incapacitated seats. Instead, grant power to both the House and Senate to examine the capacity of its members in the wake of a catastrophic attack and, pursuant to emergency rules of proceeding, to declare incapacitated seats “empty”¹⁸¹ and excluded from the denominator.¹⁸² The denominator under this emergency rule would be members chosen, sworn, and living who are physically and mentally capable of performing their job functions—in our examples, 101 House members, the presence of fifty-one establishing a quorum, and thirty-one senators, the presence of sixteen establishing a quorum.

This working rump Congress now could function in the immediate continuity stage.¹⁸³ These seats continue to be deemed empty and excluded from the quorum, even when vacant seats (seats whose holders were killed in an attack) have moved through interim and final repopulation. At that point, for example, the House of Representatives would operate on a 201-member denominator (including the 100 vacant seats filled first by appointees and then by members chosen in special elections), and the Senate would operate on a fifty-six-member denominator (including the twenty-five vacant seats similarly filled). As incapacitated members recover and return to work, the denominator in each house climbs; as incapacitated seats become vacant due to death, resignation, or otherwise, the seats are repopulated and added back to the denominator.

The check on abuse of this power to exclude empty seats from the denominator would be that the incapacitated member decides unilaterally and unreviewably when she no longer is incapacitated and can return.¹⁸⁴ And the member’s view prevails over any contrary opinion

Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. (2002).

181. As opposed to “vacant.” See *supra* note 170.

182. This procedure absolutely requires a constitutional amendment superseding the Quorum Clause and empowering a house to establish a quorum rule that could exclude some duly chosen, sworn, and living members of that body under some (hopefully) limited and cabined circumstances. A “majority” of a house under the present Quorum Clause could exclude vacant seats; it cannot exclude seats that are filled by living members who simply are unable to attend Congress, regardless of the cause. See *supra* notes 45-51 and accompanying text. A quorum rule excluding living-but-incapacitated members must be made constitutionally permissible by amendment, such as the provision suggested by Senator Cornyn. See *supra* notes 34-41 and accompanying text.

183. See *supra* Part II.A.

184. See Continuity of Congress Act of 2003, S. 1820, 108th Cong. § 2(a)(3), (b)(3) (2003) (“A member that has been incapacitated may reclaim his or her office at any time after such member determines that he or she is no longer incapacitated.”); CONTINUITY OF GOV’T COMM’N, *supra* note 4, at 29 (“[M]embers who are declared incapacitated shall return to their seats when they declare themselves fit to return to office.”).

of the rest of that house; once the member declares her capacity to act by appearing at Congress, her seat no longer is empty and is included in the quorum denominator.¹⁸⁵ The rule also would be limited to emergencies, subject to a high-threshold trigger such as death or incapacity of at least half the House membership and inapplicable where only a small number of members are incapacitated or disabled.

The obvious problem is that this approach leaves us with the smaller, unrepresentative Congress for a longer period of time, perhaps until the end of the term. A quorum to do House business would be established by the presence of only 101 members, with fifty-one able to enact legislation, until the next regularly scheduled election. Even if all 201 members of this rump House are popularly elected, the functioning body still is less than a working majority of the full regular House and might be geographically, politically, and ideologically different from the pre-attack body.¹⁸⁶ All the while, the constituents of incapacitated members remain effectively unrepresented.

On the other hand, every member of Congress is fully vested in her seat for a defined period, with the leeway to function fully as a representative. And some incapacitated members will recover and return to Congress, increasing the size of the House and the denominator gradually. The political living will rule also helps under this proposal, by capping the amount of time that a seat could be excluded from the denominator and thus the amount of time under a skeletal, less representative Congress. The incapacitated member's advance directive could provide that if by the time special elections are held following the catastrophic event the member has not returned, she will be deemed to have resigned, vacating the seat, and a new member can be chosen from that state or district in that special election.

* * *

Ensuring the continuity of the two institutions that comprise Congress at the repopulation stages presents a choice between less-than-ideal options. One possibility gives us two full-capacity houses, with a large number of appointees and many acting members merely holding space as

185. The only option for the House, if it does not want a member to return, becomes expulsion by two-thirds vote with all the built-in procedural protections of expulsion, including having the targeted member herself included in the denominator when measuring the quorum. *See Powell v. McCormack*, 395 U.S. 486, 508-10 (1969) (holding that an expulsion vote must clearly be a vote for that purpose and rejecting the argument that exclusion and expulsion are indistinguishable even when two-thirds of members vote to exclude a member); *id.* at 553 (Douglas, J., concurring) (arguing that Powell's case was not one of expulsion, although the analysis would have been different if it were).

186. *See supra* notes 72-81.

proxies for some indeterminate period until the regular member either returns or dies. Alternatively, we have numerically smaller houses comprised of fully functioning members, whether elected or appointed and awaiting election, all serving for definite periods and possessing the independence and will to exercise a fuller range of discretion.

I suggest that the choice goes in different directions, depending on whether a seat has been rendered vacant by the member's death or empty by the member's incapacitation. The difference remains one of temporal indeterminacy and context of an appointment. A larger legislative body is preferable, regardless of how members were selected, when there is certainty as to the length and terms of service, even if the length is only until an election four months later that comes with appointment to vacant seats.¹⁸⁷ But it may be arguable that a small legislature comprised of fully empowered and independent members who truly understand their roles is preferable to one in which a large number are strangers to the body, only holding space as the proxy for another for an indeterminate period, perhaps an unacceptably long period of two or six years.

187. Fixed terms for elected officials are a cornerstone of the republican scheme established by the Constitution. See THE FEDERALIST NO. 39, *supra* note 8, at 190 (James Madison) (Garry Wills ed., 1982); see Joel K. Goldstein, *The New Constitutional Vice President*, 30 WAKE FOREST L. REV. 505, 551 (1995); see *supra* notes 72-81.